S. J. Field. 1/7

SUPREME COURT OF THE UNITED STATES.

No. 279.

THE MILWAUKEE AND MINNESOTA RAILROAD COMPANY, APPELLANTS,

vs.

JAMES T. SOUTTER AND SHEPHERD KNAPP, SURVIVORS OF GREENE C. BRONSON, DEC'D, ET AL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF WISCONSIN.

GOVERNMENT PRINTING OFFICE.

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1 Circuit court of the United States for the 9th circuit and district of Wisconsin.

UNITED STATES OF AMERICA,
District of Wisconsin, ss:

At a stated term of the circuit court of the United States of America for the ninth circuit and district of Wisconsin, begun and held, according to law, at the city of Milwaukee, in said district of Wisconsin, on the second Monday (being the 12th day) of September, A. D. 1864.

Present: The Honorable Samuel F. Miller, associate justice of the Supreme Court of the United States, presiding judge, and Honorable Andrew G. Miller, judge of said court; Darius C. Jackson, marshal; A. Scott Sloan, clerk.

Among others, the following proceedings were had, to wit:

THE MILWAUKEE AND MINNESOTA RAILROAD COMPANY, complainant,
vs.
1½ JAMES T. SOUTTER AND SHEPHERD KNAPP, survivors of Greene C. Bronson, deceased, and William Wallace Pratt, William White, and the Milwaukee and St. Paul Railway Company, defendants. } In equity.

Be it remembered, that heretofore, to wit, on the tenth day of August, A. D. 1864, came the complainant, by Matt. H. Carpenter, its solicitor, and filed its supplemental bill of complaint against the above-named defendants, as follows:

Supplemental bill of complaint.

1¾ To the judges of the circuit court of the United States for the ninth circuit and district of Wisconsin, in equity.

The Milwaukee and Minnesota Railroad Company, one of the defendants to the bill of complaint of Greene C. Bronson, James T. Soutter, and Shepherd Knapp, complainants against the La Crosse and Milwaukee Railroad Company and others, exhibited in the district court of the United States for said district on the 5th day of December, A. D. 1859, the said Milwaukee and Minnesota Railroad Company being a corporation existing under the laws of the State of Wisconsin, brings this its bill, in the nature of a supplementary bill, against the said James T. Soutter and Shepherd Knapp, survivors of Greene C. Bronson, deceased, and William Wallace Pratt, William White, and the Milwaukee and St. Paul Railway Company, the said Pratt and said White being citizens of the State of Wisconsin, and said Milwaukee and St. Paul Railway Company being a corporation existing under the laws of said State of Wisconsin.

And thereupon your orator complains and says:

That the La Crosse and Milwaukee Railroad Company was, from the 1st day of January, 1850, until the 21st day of May, A. D. 1860, a corporation existing under the laws of the State of Wisconsin, and that during that time its business affairs were managed by a board of directors; that about the 21st day of June, A. D. 1858, the said company was indebted to a large amount of floating debt, accumulated for rolling stock and materials fur-

nished and provided, and labor performed for said company, which was unsecured upon the railroad or other property of said company; and that a large number of farmers along the line of said company's railroad had before then loaned their credit, in form of bonds and mortgages, to aid said company in the construction and equipment of its said railroad; which bonds and mortgages had been before then used by the said company, with a stipulation on its part with and to said farmers to pay the interest that might accrue thereon, and that a large sum of said interest which said company was bound to pay as aforesaid had become due, and the said company was unable to pay the same, and proceedings were threatened
2 against such farmers to enforce payment of such interest; and that the said company, for the purpose of securing said indebtedness and interest, and for other legitimate and necessary purposes, did, on or about the day and year last aforesaid, make, sign, seal, execute, and perfect, ready to be negotiated, sold, delivered, and transferred in the payment of said indebtedness of said company, and in payment of said interest, and to be used in and about the necessary and proper business of said company, one thousand bonds of one thousand dollars each, and fourteen hundred bonds of five hundred dollars each, and three thousand bonds of one hundred dollars each, all dated that day and year, and payable in A. D. 1888, with interest at seven per cent., payable semi-annually, on the 1st day of January and July of each year, with coupons for said interest to said bonds respectively attached; and that to secure the payment of said bonds, and thereby enable said company to use said bonds for the purposes aforesaid, the said company did, on the 21st day of June, 1858, make, execute, sign, acknowledge, and perfect its mortgage or deed of trust in due form of law, and as it by law had authority to do, to William Barnes, to secure the payment of said last-named bonds and the interest thereon, in and by which said mortgage or deed of trust said company mortgaged to said Barnes, trustee for the purposes aforesaid, "all and singular the railroad of said company, commencing in the city of Milwaukee and running from thence to La Crosse, a distance of about two hundred miles, a part of which road had been constructed and was then in full operation, and the residue was then in process of construction, including all and singular the several tracts, pieces or parcels of land which then were or thereafter might be or constitute the site of the road-ways, turn-outs, engine-houses, workshops, depots, and other buildings, and all other lands and real estate which then constituted, or might thereafter constitute, or be, a part of or appertain to said railroad, whether then made or to be made thereafter, and all the engine-houses, workshops, depots, and other buildings, and all the other improvements on or appertaining to said railroad, whether then made or built or to be built and made thereafter; and all and singular the locomotive engines and other rolling stock, and all the other equipments of every kind and description which had then been or might thereafter be procured for or used on said railroad, and all the materials, tools, implements, utensils, and other personal property which had then been or might thereafter be procured for or used in connection with such railroad.
3 And also, all and singular the rights, liberties, privileges and franchises of said railroad to La Crosse, together with other property and things in said mortgage described; and that about the said 21st day of June, A. D. 1858, said mortgage was by said company duly and legally delivered to said William Barnes, trustee, and was by said trustee thereafter caused to be duly and legally recorded in the office of the secretary of state of the State of Wisconsin; and, as the plaintiff says, on information and belief, in the offices of the registers of deeds in the several counties through which said railroad passes and was then located.

That on the 11th day of August, A. D. 1858, the said company made,

signed, sealed, and delivered to said Barnes, trustee, a certain indenture of supplemental mortgage or deed of trust, by which said company recited and affirmed the terms and conditions of said mortgage or deed of trust, hereinbefore set forth, and dated June 21st, 1858, and did convey to said Barnes, as trustee as aforesaid, in addition to the things in said first mortgage conveyed, the following, that is to say, all and singular the rights, privileges, liberties, and franchises of said company of every kind and description; and also all lands granted or intended to be granted to said company under and by virtue of the act of Congress and the act of the legislature of the State of Wisconsin, in said supplementary mortgage mentioned, and also all the hereditaments and appurtenances belonging or in anywise appertaining to the lands and real estate therein conveyed or intended to be conveyed; and also all and singular the stock, railroad or other bonds, bills of exchange, promissory notes, accounts, causes of action, demands and choses in action of whatsoever nature, which might be owned, or in which said company might have an interest, on such day as such company might first make default in the payment of the rest or principle, or any part thereof, which might thereafter become due on any of the said bonds issued or to be issued by said company, and to secure which said mortgage was given. That immediately thereafter the said Barnes caused said supplementary mortgage to be recorded as in the same offices as the said first-named deed of trust or mortgage to said Barnes was recorded, as hereinbefore set forth; a copy of which said mortgage or deed of trust, and a copy of which said supplementary mortgage or deed or trust to said Barnes, are attached hereto and marked respectively Exhibit No. 1 and Exhibit No. 2.

That immediately thereafter said company commenced to deliver
4 the said last-named bonds so secured as aforesaid, in payment of the indebtedness of said company, and for the other purposes contemplated by said company in the issue thereof, and in the necessary and proper business of said company, and that all of said bonds were sold and delivered in payment, and transferred by said company for the purposes and in the manner contemplated as aforesaid by said company, and that large numbers of said bonds were paid and delivered to said residents of the State of Wisconsin in payment of the indebtedness of such persons against said company for materials furnished to and services rendered for said company, and that large numbers of said bonds are now held by such persons in the said State, or have been by them turned into the stock of the Milwaukee and Minnesota Railroad Company, as hereinafter stated, and that a large number of said bonds have passed into circulation in the bond and stock markets of the United States, particularly in the city of New York, which are now held by bona fide purchasers and owners, or have by them been turned into the stock of the Milwaukee and Minnesota Railroad Company, as hereinafter mentioned. That about the 1st of Feb, A. D. 1859, the said company having made the default in the payment of, or part of, the interest due on said bonds secured as aforesaid, the said Wm. Barnes, in pursuance of the provisions of the laws of the State of Wisconsin then in force in that behalf, and the provisions contained in said mortgages or deeds of trust, proceeded to the foreclosure of said mortgages by advertisement, and, having previously given the notice required by law in that behalf, on the 21st day of May, A. D. 1859, said William Barnes, trustee, sold at public auction at the court-house in the city and county of Milwaukee, in said State of Wisconsin, all property, rights, privileges, franchises, things in action, and other things in said mortgage and supplementary mortgage to him, said Barnes, described; and the said William Barnes, trustee, then and there at said sale became the purchaser thereof, according to the provisions of the laws of said State of Wisconsin then in force in that behalf,

at and for the sum of one million five hundred and ninety-three thousand three hundred and thirty-three dollars and thirty-three cents, ($1,593,333 33;) no other person or body having made any bid whatever for the same, and that said mortgages thus became, and were thereby, foreclosed, according to the provisions of the laws of the State of Wisconsin in that be-
5 half then in force. And that said Barnes, by virtue of said purchase and the provisions of the law of the State of Wisconsin then in force in that behalf, became the owner of the property, and franchises, and other things so purchased by him, and thereafter held the same in trust, and only in trust, for the holders of the then outstanding bonds secured by said mortgages.

And that afterwards, to wit, on or about the 23d day of May, A. D. 1859, the owners and holders of a large majority of the said bonds proceeded to organize anew, and then and there elected directors, and took the corporate name "Milwaukee and Minnesota Railroad Company," and said Barnes then and thereafter conveyed to said last-named company all the property and things by him purchased as aforesaid, and thereafter said company proceeded, and conducted its business under and in pursuance of the charter of said La Crosse and Milwaukee Railroad Company, and thereby became, and ever since have continued, a corporation under and by virtue of the laws of said State, capable of sueing and being sued; and that said Milwaukee and Minnesota Railroad Company immediately thereafter entered into the possession of said property and franchises of said La Crosse and Milwaukee Railroad Company, so far as the same were in possession of said La Crosse and Milwaukee Railroad Company at the time of said sale.

That said bondholders at said new organization elected and chose the following-named persons directors of said Milwaukee and Minnesota Railroad Company, viz:

Russell Sage, N. J. Emmons, Hans Crocker, William E. Smith, Lemuel W. Weeks, W. B. Gilbert, William Gould, William R. Sill, and —— Battershall; and that said directors immediately thereafter organized the said board of directors by electing and choosing Russell Sage president, N. J. Emmons vice-president, and Dwight W. Keyes secretary of said Milwaukee and Minnesota Railroad Company; and that neither the La Crosse and Milwaukee Railroad Company nor any subsequent incumbrancer or incumbrancers, nor any other person or persons, did, within one year after said sale, redeem or offer to redeem the property and things so sold under said mortgages or trust deeds according to law in that behalf.

That by virtue of the said foreclosure of said deeds of trust or mortgages to said Barnes, as hereinbefore set forth, and the organization of said Milwaukee and Minnesota Railroad Company and conveyance by said Barnes as
6 hereinbefore set forth, and the said premises not having been redeemed, as hereinbefore stated, the said Milwaukee and Minnesota Railroad Company, from and after May 21, 1860, became, under and by the laws of the State of Wisconsin, the successor of the La Crosse and Milwaukee Railroad Company, as to all the property and things described in said deeds, and the owner of and clothed with all the rights, privileges, franchises, and property, real and personal, and things in action, and effects of every nature and description, before then belonging to said La Crosse and Milwaukee Railroad Company, wherever situated and however circumstanced, subject only to such valid and legal liens and incumbrances thereon as were prior to said first deed to said Barnes; and that the said Milwaukee and Minnesota Railroad Company, being by law an incorporated company, composed of the creditors of the La Crosse and Milwaukee Railroad Company, and purchasers at foreclosure sale, (in the manner hereinbefore stated,) as corporators, has a legal right to object to, resist, and set aside all conveyances, negotiations, sales, trans-

fers, leases, mortgages, or judgments, which were or have been made or suffered by said La Crosse and Milwaukee Railroad Company with intent to hinder, delay, or defraud its creditors; and has the right to object to, resist, and set aside every illegal, unjust, or fraudulent claim of any person or persons, against the said La Crosse and Milwaukee Railroad Company, which is apparently a lien or incumbrance upon any of the property, rights, privileges, franchises, or other things whatsoever of said last-named company, which were embraced or described, or intended to be embraced or described, in either of said trust deeds to said Barnes, and now owned by said Milwaukee and Minnesota Railroad Company, as hereinbefore stated; and has the right to collect and enforce all actions and causes of action existing in favor of said La Crosse and Milwaukee Railroad Company, and conveyed by said trust deeds to said Barnes, or either of them.

Your orator further shows that the La Crosse and Milwaukee railroad, so called, extends from Milwaukee to La Crosse; that that portion of said road lying between Milwaukee and Portage City is called the eastern division of said road; and that that part of the same lying between Portage City and La Crosse is called the western division of said road.

Your orator further shows that before the making and delivery of either of the said mortgages to the said Barnes, as hereinbefore stated, the
7 said La Crosse and Milwaukee Railroad Company made, executed, and delivered to one Francis A. Palmer, as trustee, a certain mortgage or deed of trust, dated June 30, A. D. 1854, and a certain mortgage or deed of trust, supplementary thereto, dated February 18, A. D. 1856, upon the railroad from Milwaukee to Portage City, (which is known as the eastern division of the La Crosse and Milwaukee railroad,) together with the rolling stock and franchises of the said company, belonging and pertaining to said eastern division, which said mortgages or deeds of trust are hereto attached and marked Exhibit No. 3 and Exhibit No. 4, and made part of this bill of complaint; and that the said mortgages or deeds of trust spoken of together are called the Palmer mortgage, and are the first lien or incumbrance by mortgage upon any portion of the said La Crosse and Milwaukee railroad, and the rolling stock and franchises, or any part thereof, of the said La Crosse and Milwaukee Railroad Company; and that the bonds mentioned in and secured by said Palmer mortgage are now outstanding in the hands of bona fide holders, to the amount of nine hundred thousand dollars; and said Palmer mortgage is a first and valid lien and incumbrance upon the premises therein described, to the amount aforesaid; and no proceedings have ever been had to foreclose the same.

Your orator further shows that before the making and delivery of either of the said mortgages to the said Barnes, and after the making, delivery, and registration, (according to the laws of the State of Wisconsin,) of the said Palmer mortgage, to wit, on the 31st day of December, in the year A. D. 1856, the said La Crosse and Milwaukee Railroad Company made, executed, and delivered to Greene C. Bronson, James T. Soutter, and Shephard Knapp, as trustees, a certain mortgage or trust deed of that date, which is called and known as the land grant or western division mortgage, a copy of which is hereto attached and marked Exhibit No. 5, and made a part of this bill of complaint; the premises of which mortgage are called the western division of said La Crosse and Milwaukee railroad, and rolling stock and franchises pertaining thereto.

That afterwards, to wit, on the 17th day of August, A. D. 1857, the said La Crosse and Milwaukee Railroad Company made and delivered a certain other mortgage or deed of trust to Greene C. Bronson and James T. Soutter,
as trustees, upon the eastern division of said railroad, so called, and
8 the rolling stock and franchises pertaining thereto, to secure certain

bonds therein mentioned, to the amount of one million of dollars; a copy of which last-named mortgage is hereto attached, marked Exhibit No. 6, and made a part of this bill of complaint.

Your orator further shows that neither the said mortgage to the said Bronson, Soutter, and Knapp upon the said western division, nor the said mortgage to the said Bronson and Soutter upon the eastern division, was made or intended to be made a second mortgage as to the other, upon the rolling stock and franchises of said company; that one mortgage created an incumbrance upon the said western division, and the rolling stock and franchises of the said company pertaining to said western division, and the other created an incumbrance upon the said eastern division, and the rolling stock and franchises of the said company pertaining to said eastern division; and each of said mortgages is, as to the other, a first mortgage upon the premises which it describes; and neither of the said mortgages describes and conveys any portion of the premises described and conveyed in the other.

That afterwards, on the 5th day of December, 1859, the said Bronson, Soutter, and Knapp exhibited in the district court of the United States for the district of Wisconsin, their bill of complaint against the La Crosse and Milwaukee Railroad Company, your orator and others, to foreclose the said mortgage given to them, and called the western division mortgage, a copy of which said bill of complaint, except the exhibits thereto, is hereto attached and marked Exhibit No. 7; that subpœna was duly issued upon said bill, and proceedings thereupon had to a final decree, as hereinafter stated.

That on the 9th day of December, A. D. 1859, the said Bronson and Soutter exhibited in the district court their bill of complaint against the said La Crosse and Milwaukee Railroad Company, your orator and others, to foreclose the said mortgage given to them upon the said eastern division; a copy of which said last-mentioned bill of complaint, except the exhibits and schedules thereto attached, is hereto attached and marked Exhibit No. 8, and made a part of this bill of complaint; that subpœna issued thereon, and proceedings were had in said district court, and in the circuit court of the United States for said district, as hereinafter stated.

Your orator further shows that in the said suit commenced to foreclose the said mortgage upon the said western division, no persons or
9 corporations were made parties defendant, except those having or claiming to have an interest in or incumbrance upon the said western division; and that in the said suit commenced to foreclose the said mortgage upon the said eastern division, no persons or corporations were made parties, except those having or claiming to have some interest in or a lien upon the said eastern division; and that in neither of the said suits did the said complainants therein pray or claim any relief as against the complainants in the other suit; but that the said two foreclosure suits were in all respects, and in every particular, separate and independent suits, as the respective mortgages, which they respectively were exhibited to foreclose, were separate and distinct mortgages upon separate and distinct premises.

Your orator further shows that neither the said mortgage upon the western division nor the said mortgage upon the eastern division, pretended to enumerate, specify, or particularly describe the amount of rolling stock intended to be thereby conveyed; and that in neither of the suits commenced to foreclose said respective mortgages, did the bill of complaint pretend to state, enumerate, or describe the precise rolling stock or amount of rolling stock included, or intended to be included, in and conveyed by the mortgage which it was exhibited to foreclose, or which belonged thereto at the time said bill was exhibited. But your orator, as owner of the equity of redemp-

tion of the said western division, and the rolling stock and franchises pertaining thereto, was made a party defendant to the said bill of complaint, which was exhibited to foreclose the said mortgage on the said western division; and your orator in the said western division mortgage foreclosure suit, and as against the complainants in that suit, was the owner of and entitled to reserve, claim, and have all the railroad rolling stock and franchises which had belonged to the said debtor company, except that which was included in, and incumbered by, the said western division mortgage. And your orator, as the owner of the equity of redemption of the said eastern division, and rolling stock and franchises pertaining thereto, was made a party defendant to the bill of complaint in the suit commenced to foreclose the said eastern division mortgage; and in that suit, and as against the complainants in that suit, your orator was the owner of and entitled to claim, reserve, and have all the railroad, rolling stock, and franchises, which had belonged to the said debtor company, except that which was incumbered by, and included in, the said eastern division mortgage.

10 Your orator further shows that the said district court, in the said suit commenced to foreclose the said western division mortgage, did, on the 11th day of March, A. D. 1861, for the purpose of ascertaining what, and what amount of rolling stock was included in, and encumbered by, the said western division mortgage, make an order of reference to Winfield Smith, a master, and Jerome R. Brigham and Joshua Hathaway, special masters, to ascertain and report, among other things, the whole amount of rolling stock on the whole railroad from Milwaukee to La Crosse, and to specify the quantity thereof covered by, and included in, the said western division mortgage, and also the amount thereof covered by, and included in, the mortgages on the said eastern division; that is, the mortgage to said Palmer, and the said mortgage to said Bronson and Soutter, on said eastern division hereinbefore mentioned; and that on the 21st day of March, A. D. 1861, it was ordered by the judge of said district court that Increase A. Lapham be, and he thereby was, appointed a special master in place of the said Joshua Hathaway, who declined to serve. And your orator further shows that afterward, on the 7th day of October, A. D. 1861, the said master and special masters mentioned in said order having heard the proofs of the respective parties of said western division suit in that behalf, did make in said suit their report to said court, among other things, that the whole amount of rolling stock on the whole road, at cost price at the time of the filing of the bill of complaint in the said suit, was five hundred sixty-nine thousand six hundred thirty-five dollars and seventy-eight cents, and that an additional amount of fifty-three thousand six hundred dollars had been purchased after the filing of the said bill of complaint, amounting in the whole to $623,235 78; and that of said rolling stock only forty box cars, amounting at cost price to thirty-one thousand nine hundred and twenty-nine dollars and sixty-four cents, and numbered, 330, 332, 334, 336, 338, 340, 342, 344, 346, 348, 350, 352, 354, 356, 358, 360, 362, 364, 366, 368, 370, 372, 374, 376, 378, 380, 382, 384, 386, 388, 390, 392, 394, 396, 398, 400, 402, 404, 406, 408, were covered by and included in said western division mortgage; and that the remaining portion of said rolling stock was included in and covered by the said mortgage to said Palmer, and the said mortgage to the said Bronson and Soutter, on said eastern division hereinbefore mentioned; that afterwards, on the 2d day of November, 1861, the said complain-

11 ants in said western division mortgage foreclosure suit filed their exceptions therein to said report, among other things as follows: "Fourth, for that the said masters and special masters have in and by their said report certified that all the rolling stock on said road, except forty box cars, which are specially named in said report, was covered by, and included

in, the first mortgage upon the said railroad, and in the mortgage upon the said railroad executed to the said Greene C. Bronson and James T. Soutter, and bearing date on the 17th day of August, A. D. 1857; whereas the said master and special masters ought to have certified that all the rolling stock on said road (except that purchased by the receiver since the commencement of this suit, amounting to the sum of $53,600,) was covered by, and included in, the mortgage given to the said complainants, and described in the bill of complaint in this cause; and that said mortgage was a first and prior lien on said rolling stock superior to all other liens; and that as to the rolling stock purchased by said receiver above mentioned, 105–200 thereof was covered by the mortgage described in the bill of complaint, and that to that extent the complainant's mortgage was a first lien thereon;" and that afterward, on the 7th day of January, A. D. 1862, the said district court having heard and considered the said exception, made an order modifying the said report, to the effect that all the rolling stock that was on said road when the receiver was appointed, except the said forty box cars, was declared to be covered by and included in the first mortgage of the road from Milwaukee to Portage City; and that all the rolling stock on said road that had been purchased or procured while the said court had held possession by its receiver, costing 147,942 dollars and 63 cents, be applied to said first mortgage on said eastern division and the said western division mortgage, in proportion to the net revenues of the said eastern division respectively, from the time of the appointment of the said receiver; that afterwards, to wit, on the 13th day of January, A. D. 1862, the said district court in said western division mortgage foreclosure suit, made a final decree therein, foreclosing said western division mortgage, and decreeing a sale of the mortgaged premises in the said mortgage described, and declaring that all the said rolling stock on the whole of said road, except the said forty box cars and the said proportion of rolling stock, purchased by the receiver hereinbefore mentioned, belonged to, and was covered by, the mortgages on the said eastern division. That the said Bronson, Soutter, and Knapp
12 did not appeal from the said final decree of said district court in said western division mortgage foreclosure suit, but, on the contrary thereof, proceeded to execute the same by a sale of the said mortgaged premises, as determined by the said report, modification of report, and final decree in said cause, as hereinbefore stated; and that a sale thereof was had under the direction of Darius C. Jackson, marshal of the United States for the said district, on the 25th day of April, A. D. 1863; which sale was afterwards, to wit, on the 5th day of May, A. D. 1863, confirmed by order of the said district court, as appears of record in said cause.

Your orator further shows that a copy of said order of reference is hereto attached, marked Exhibit No. 9; that a copy of said report is hereto attached, and marked Exhibit No. 10; that a copy of the said exceptions thereto is hereto attached, and marked No. 11; that a copy of the said order of said court, modifying said report, and overruling the exceptions thereto, is hereto attached, marked Exhibit No. 12; that a copy of the said final decree is hereto attached, marked Exhibit No. 13; that a copy of said marshal's report of said sale is hereto attached, marked Exhibit No. 14; that a copy of said order of said court, confirming said sale, is hereto attached, marked Exhibit No. 15; and your orator prays that all said exhibits may be taken and considered as a part of this your orator's bill of complaint, with the same effect as if the same were fully set out therein, according to their legal effect.

Your orator further shows that immediately after said sale, the said William Wallace Pratt and the said William H. White, who were the purchasers at the said mortgage sale, did, or did pretend to, organize a corporation

under, and in pursuance of, the laws of the said State of Wisconsin in that behalf, to take, hold, and operate the said mortgaged premises purchased by them as aforesaid, and did assume and take as the corporate name of the said corporation the name and style, "The Milwaukee and St. Paul Railway Company;" and that the said Pratt and White and their associates now claim to be and constitute a corporation under the corporate name last aforesaid, and in that character and capacity pretend to hold and operate the said mortgaged premises so purchased by the said Pratt and White.

Your orator further shows that by the proceedings in the said western division mortgage foreclosure suit to a sale and confirmation as hereinbefore stated, (if the same were and are legal and valid,) the said Pratt and
13 White acquired, and after the organization of the said Milwaukee and St. Paul Railway Company, that company was entitled to hold, use, and operate the mortgaged premises described in said western division mortgage, as the same had in said suit been determined as aforesaid; that is, all and singular the several tracts, pieces, or parcels of land which at the date of said decree constituted the site of the roadway, turn-outs, engine-houses, workshops, depots, and other buildings, and all the other lands and real estate which then constituted a part of the roads of the said La Crosse and Milwaukee Railroad Company, from Madison, by way of Portage City, to the St. Croix River or Lake, between townships 25 and 31, and from Portage City to La Crosse, together with the said forty box cars; and the said proportion of said rolling stock, purchased by the said receiver, which by the order of said court modifying the said report and the said final decree in said western division mortgage foreclosure suit, were determined and decreed to belong to and covered by said mortgage, whenever the same should be thereafter legally ascertained, or separated from the common stock by negotiation and agreement between the parties; and that the said Pratt and White, or the Milwaukee and St. Paul Railway Company, acquired the same right there, and the right to use and operate the same in the same manner that the said La Crosse and Milwaukee Railroad Company could have used and operated the same if said sale had not taken place, and not otherwise.

Your orator further shows that no proceedings were ever had in the said western division mortgage foreclosure suit to ascertain the proportion which the net earnings of the said western division mortgaged premises bore to the net earnings of the said eastern division mortgaged premises during the time mentioned in said decree in that behalf; and that no proceedings have ever been had at law or in equity to ascertain the same, and that the same are still unascertained and unknown, and that therefore it remains to this time unascertained and undetermined by the decree of any court, or other competent authority, whether or not any portion of the said rolling stock which was purchased by said receiver, as mentioned in said decree, was covered by said western division mortgage, and whether or not the said Pratt and White or the said Milwaukee and St. Paul Railway Company
14 acquired by the said sale and confirmation thereof, any portion of the said rolling stock which had been purchased by said receiver, as recited in said order and decree of said district court in said western division mortgage foreclosure suit; but your orator is informed and believes, and thereupon shows, that the said premises included in and incumbered by the said western division mortgage did not from the time of the appointment of the receiver to the date of the said decree in said western division mortgage foreclosure suit, (being the time mentioned in said decree,) earn any net revenue whatever; but that, on the contrary thereof, the expense of operating the said western division mortgage premises during the term of time aforesaid, together with the necessary disbursements in that behalf and

otherwise made by the receiver by orders of said court in said cause, were more than the whole gross receipts arising from the operation of the same; and that the said Pratt and White, or the said Milwaukee and St. Paul Railway Company, are therefore not entitled to claim any portion of the said rolling stock purchased by said receiver as aforesaid, under and by virtue of the said purchase at the said sale, and the confirmation thereof in said suit.

Your orator further shows that in the said western division mortgage foreclosure suit, Hans Crocker, esq., was appointed receiver by an order of said court, in said suit, made on the 18th day of May, 1860, and the supplementary order of said court made on the 7th day of June, 1860, a copy of which order and supplemental order is hereto attached, and marked Exhibit No. 16.

That afterwards the said Hans Crocker was appointed receiver in a certain suit, in said district court, in equity, in favor of one Sebre Howard against the La Crosse and Milwaukee Railroad Company and Selah Chamberlain, defendants, a copy of which said order of appointment, and the modification thereof, is hereto attached, and marked Exhibit No. 17; that afterwards, on the 6th day of July, A. D. 1860, and said Hans Crocker was also appointed receiver in the eastern division mortgage foreclosure suit, by an order made by the said court in said cause, a copy of which is hereto attached, and marked Exhibit No. 18

Your orator further shows that on the 11th day of March, 1861, the said district court, in the said eastern division mortgage foreclosure suit, in which said Bronson and said Soutter were complainants, made a certain order of reference therein, a copy of which is hereto attached, and marked Exhibit No. 19, which last-mentioned order was modified by an order made by the judge of said court on the 21st day of March, A. D. 1861, as follows, viz: "Ordered by the judge that Increase A. Lapham be, and hereby is, appointed a special master in this case in the place of Joshua Hathaway, who declined serving;" that afterwards, on the 7th day of October, 1861, the said master and special masters made their report to said court, in said last-named suit, a copy of which is hereto attached, and marked Exhibit No. 20; and afterwards, to wit, on the 7th day of January, 1862, certain exceptions having been made to said report by the parties to said suit, the said district court made an order in said cause confirming the said report of the said masters as to the said forty box cars which said masters had reported were covered by said western division mortgage, and modifying said report by determining that a portion of the rolling stock purchased by the receiver corresponding to the proportion of the net earnings of the said western division should be applied to the said western division mortgage, a copy of which last-named order of said court is hereto attached, and marked Exhibit No. 21; and that afterwards, to wit, on the 13th day of January, A. D. 1862, the said district court made a final decree in said last-named suit, foreclosing the said eastern division mortgage, and ordering a sale of its premises, a copy of which decree is hereto attached, marked Exhibit No. 22; but your orator shows that the said Bronson and Soutter, complainants in said suit, appealed from said decree last mentioned to the Supreme Court of the United States, and that said Supreme Court, on the hearing of said appeal at the last term of said Supreme Court, reversed said decree of said district court, and remanded the said cause to this court for further proceedings by mandate, a copy of which is hereto attached, marked Exhibit No. 23; and that the said suit is still pending and undetermined in this court, and that no final decree has as yet been entered thereon; and that the said Hans Crocker still continues receiver in said suit under and by virtue of the said order of appointment made therein, a copy of which is hereto attached, marked Exhibit No. 18; and that your orator is thus prevented from taking

actual possession of the said railroad, rolling stock, and franchises of which it is the owner, as hereinbefore stated, or bringing suit at law therefor, and is remediless in the premises, except by the aid of a court of equity.

Your orator further shows that the said Hans Crocker still remains receiver, or claims to so remain, in the said Howard suit hereinbefore mentioned, under and by virtue of the order of appointment, a copy of which is Exhibit No. 17 hereto.

16 Your orator further shows that the said Howard suit hereinbefore mentioned was commenced by the exhibiting of a bill of complaint in equity to enforce payment and satisfaction of a certain judgment in favor of the said Howard against the said La Crosse and Milwaukee Railroad Company, which judgment was subsequent in date to the said mortgages to the said Barnes, and that if said judgment was ever a lien upon said railroad, rolling stock, or franchises, such a lien was extinguished thereon by the said foreclosure of the said Barnes's mortgages; and your orator is advised and insists that the prior appointment of said Hans Crocker as receiver in the said western division mortgage foreclosure suit had the effect in law to render inoperative the said appointment in the said Howard case in relation to all the railroad, rolling stock, and franchises of which the said Crocker was appointed receiver in the said western division mortgage foreclosure suit; and that the appointment of the said Crocker as receiver in the said eastern division mortgage foreclosure suit had the effect in law to suspend the appointment of the said Crocker as receiver in the said Howard case, in relation to all the property of which the said Crocker was appointed receiver in the said eastern division mortgage foreclosure suit; and that the property, railroad, rolling stock, and franchises of which said Crocker was appointed receiver in said foreclosure suits, was the same, and all of the railroad railroad stock, franchise, and other things of which said Crocker was appointed receiver in said Howard case.

Your orator further shows that the said Milwaukee and St. Paul Railway Company, designing and intending to injure, oppress, and defraud your orator, fraudulently and falsely claims and pretends that it, as a corporation organized under and in pursuance of the laws of the State of Wisconsin, by said Pratt & White, purchasers at said foreclosure suit sale, as hereinbefore mentioned, has by virtue of said sale and confirmation thereof, and the said organization of the said company, become (as against your orators) the owner in fee of all the rolling stock which was upon said railroad at the time of the appointment of the receiver, and all of the said rolling stock purchased by the receiver and all the franchises which belonged to the said La Crosse and Milwaukee Railroad Company; and has acquired the right (as against your orator) to use and operate the eastern division of the said road as well as the said western division, and all the said rolling stock and franchises, and to take and receive and keep as its own, all the earnings, income, and revenue thereof, as against your orator.

17 Your orator further shows that the said Milwaukee and St. Paul Railway Company, fraudulently combining and confederating with Hans Crocker, receiver as aforesaid, it was fraudulently and corruptly arranged and agreed by and between the Milwaukee and St. Paul Railway Company and the said Hans Crocker, esq., receiver as aforesaid, on the 12th day of June, 1863, that the said Milwaukee and St. Paul Railway Company should enter upon and take possession of the said eastern division of said railroad and all the rolling stock and franchises hereinbefore mentioned, and use and operate and receive the rents, revenues, tolls, and income arising therefrom, in defiance of law and in fraud of the rights of your orator; and the Hon. Andrew G. Miller, as judge of the said district court, sitting in said court on the 12th day of June, 1863, made for and in the name of said

court an order in the said eastern division mortgage foreclosure suit, which was then pending in this court, and not in said district court, a copy of which order is hereto attached and marked Exhibit No. 24 ; and the said Milwaukee and St. Paul Railway Company on the said 12th day of June, A. D. 1863, procured a similar order, to be entered by this court held by the said A. G. Miller, as judge thereof, in the absence of the presiding judge of said court, in the said Howard suit, although the said Milwaukee and St. Paul Railway Company was not a party to said suit, and that said Milwaukee and St. Paul Railway Company afterwards, on the 12th day of June, A. D. 1863, under color of said orders, and in fraud of the rights of your orator, and by the acquiescence and consent of the said Hans Crocker, entered into possession of the said eastern division and all the said rolling stock and franchises pertaining thereto and belonging to your orator as hereinbefore stated, and ever since that time has operated said eastern division, rolling stock, and franchises, and received the revenues and tolls arising therefrom, and is still operating the same and receiving the said revenues and tolls arising therefrom.

And your orator further shows that ever since the 12th day of June, A. D. 1863, to this day, the said Milwaukee and St. Paul Railway Company has used the rolling stock belonging to your orator as herein stated upon the said western division of said railroad, and is now so using the same thereon; and that the said Milwaukee and St. Paul Railway Company ought to account to and with your orator, and ought in equity to pay over to the receiver in the said eastern division mortgage foreclosure suit, or to your orator, a reasonable rent for your orator's said rolling stock used upon said western division, which reasonable rent your orator, on information and belief, shows will exceed the sum of two hundred thousand dollars.

18 Your orator further shows that the said Milwaukee and St. Paul Railway Company being in possession of said eastern division rolling stock and franchises on the 28th day of April, 1864, the Supreme Court of the United States having before that decided in the said appeal pending in said Supreme Court, that the said order of the said district court made in said eastern division mortgage foreclosure suit on the 12th day of June, 1863, as hereinbefore stated, was absolutely void for the reason that said suit was pending in this court and not in said district court where said order was pretended to be made, this court, on the 28th of April, 1864, present the honorable Samuel F. Miller, presiding judge of said court, and the said Andrew G. Miller, judge of said court, made an order in said eastern division mortgage foreclosure suit vacating said order of June 12, 1863, a copy of which order last made is hereto attached, marked Exhibit No. 25; and on the same day this court made a similar order in said Howard case, vacating the said order made therein as aforesaid on the 12th day of June, 1863. And your orator shows that it thereupon became and was the duty of the said Milwaukee and St. Paul Railway Company to surrender possession of said eastern division of said railroad and the rolling stock and franchises thereto pertaining as aforesaid, to the said Hans Crocker, receiver; and that it then and there became and was the duty of the said Hans Crocker, as receiver in said eastern division mortgage foreclosure suit, to take possession of said eastern division, and the rolling stock and franchises pertaining thereto, and hereafter to operate the same, and take the revenues, rents, and tolls therefrom as receiver as last aforesaid; but your orator shows that the said Milwaukee and St. Paul Railway Company, combining and colluding with the said Crocker as aforesaid, and sure of the acquiescence and consent of the said Crocker, in violation of his duty as receiver as aforesaid, has, ever since the said orders were made by this court in the said Howard cause and in the said eastern division mortgage foreclosure suit, on the 28th day of April, 1864, as aforesaid, continued to use

and operate the said eastern division of the said railroad and the said rolling stock and franchises pertaining thereto as hereinbefore stated, and received the rents, revenues, and tolls arising therefrom; and is still operating the same, and receiving the rents, revenues, and tolls arising therefrom, in open and flagrant violation of the said orders of this court, in contempt of the authority of this court, and in fraud of the rights of your orator, in the same manner that it did operate the same and receive said revenues prior to the said orders of the 28th day of April, A. D. 1864.

19 Your orator further shows that the said Hans Crocker, receiver as aforesaid, has acquiesced and does acquiesce in the said possession of said eastern division and the rolling stock and franchises pertaining thereto, and the receiving the revenues thereof by the said Milwaukee and St. Paul Railway Company as aforesaid, since the 28th day of April, 1864; and that on the 28th of June, 1864, the said Hans Crocker, as receiver in said eastern division mortgage foreclosure suit, filed his report in this court in said cause, showing that he did not operate said eastern division and the rolling stock and franchises pertaining thereto, or receive the revenues therefrom, as it was his duty to do, a copy of which report is hereto attached, and marked Exhibit No. 26.

Your orator further shows that the said Milwaukee and St. Paul Railway Company is in possession of, and claim to own, a railroad from the Watertown Junction, so called, (a point about 14 miles west of the city of Milwaukee,) to Columbus, in said district; and is now building a line of railroad from said Milwaukee to said Watertown Junction, and from said Columbus to the city of Portage, the eastern terminus of said western division of said La Crosse and Milwaukee railroad; and intends and expects to have the same completed by the 1st day of September next, or soon thereafter, thus creating a line of railroad from Portage City to the city of Milwaukee independent of, and to be used in competition with, the said eastern division from Portage City to Milwaukee.

Your orator further shows that the said Milwaukee and St. Paul Railway Company falsely and fraudulently gives out and pretends that, by virtue of the said purchase by the said Pratt and White, and the organization by them of the Milwaukee and St. Paul Railway Company, as aforesaid, the said last-named company has acquired and possesses the right to separate and disconnect the said railroad from Portage City to La Crosse from the said eastern division from Portage city to Milwaukee, and to use the said western division independent of the said eastern division, and to feed its rival and competing line from said Portage City to Milwaukee, by way of Columbus and Watertown Junction as aforesaid; and that the said Milwaukee and St. Paul Railway Company intends to, (and will, unless restrained by an injunction issued from this court,) on the completion of the said competing line of railroad from Portage City, by way of Columbus and Watertown Junction, to said city of Milwaukee, in said district, transfer the said rolling stock belonging to your orator, as aforesaid, entirely from said eastern division of said railroad, and use the same upon the said western division

20 from La Crosse to the city of Portage, and thence over the said competing line of road to the city of Milwaukee, by way of Columbus and Watertown Junction, in fraud of your orator's rights, and to your orator's irremediable injury; and that the said eastern division of the said railroad would, if said rolling stock should be so diverted and transferred, yield no revenue and be worthless to your orator, until your orator could at some future time, and at great expense, procure therefor the necessary rolling stock.

Your orator further shows that the said Milwaukee and St. Paul Railway Company, its officers and stockholders, and the said Hans Crocker, in fraud-

ulent combination and collusion in that behalf, gave out and pretended that the rights of the said Milwaukee and St. Paul Railway Company and your orator, respectively, as to the said rolling stock, are left so vague and indefinite by the said proceedings and decree in the said western division mortgage foreclosure suit, that said Milwaukee and St. Paul Railway Company (being in possession of the whole thereof as hereinbefore stated,) can dictate terms to, and force a settlement with, your orator as the said Milwaukee and St. Paul Railway Company shall see fit; and that the orders and proceedings in said western division mortgage foreclosure suit was purposely made and rendered vague and indefinite as aforesaid, for the purpose of compelling your orator to settle with the said purchasers at the sale of the said western division foreclosure suit, upon such terms as might be dictated by them. And your orator further shows that the said illegal and fraudulent possession of your orator's railroad, rolling stock, and franchises by the said Milwaukee and St. Paul Railway Company, as hereinbefore stated, has been and is a great oppression and injury to your orator and its stockholders, and has had the effect, and still has the effect, to depress the price of your orator's stock in market, and embarrass your orator in carrying on its legitimate and proper business and raising the necessary funds with which to redeem said road, rolling stock, and franchises from existing incumbrances thereon; and that the said Milwaukee and St. Paul Railway Company and the said Crocker, in corrupt and fraudulent collusion in that behalf, have sought and are seeking thereby, fraudulently and corruptly, to injure and oppress your orator.

And your orator further states, upon information and belief, that unless the rights of the said Milwaukee and St. Paul Railway Company and your orator, respectively, to the said rolling stock, be ascertained and declared by this court, it will be and remain in the power of the said Milwaukee and St. Paul Railway Company to increase and continue the doubt which it has
21 labored to create and has created of your orator's right in the behalf aforesaid, and thereby to greatly depress the price of your orator's stock in the market, and thereby in many ways, and to an indefinite extent, to injure and oppress your orator; and that the said Milwaukee and St. Paul Railway Company now avails itself of the uncertain character of the said proceedings in the said western division mortgage foreclosure suit for the purpose of injuring and oppressing your orator as aforesaid.

Your orator further shows that the said rolling stock is being greatly lessened in value daily by said unlawful use thereof by said Milwaukee and St. Paul Railway Company; and that it is property of a character certain to be depreciated in value by use, and that the said Milwaukee and St. Paul Railway Company is using the same in such manner as to greatly injure and depreciate its value, in fraud of your orator's rights in the premises.

Your orator further shows that the rolling stock that was on said railroad when said receiver was first appointed as aforesaid, except said 40 box cars hereinbefore mentioned, is of the value of over five hundred thousand dollars; and that the rolling stock purchased by said receiver, as hereinbefore stated, is of the value of more than one hundred thousand dollars.

Your orator further shows that after the said decree in said western division mortgage foreclosure suit, the said Greene C. Bronson, one of the said complainants in said suit, departed this life at Saratoga, in the State of New York.

To the end, therefore, that the said defendants may, if they can, show cause why your orator should not have the relief hereby prayed, and may upon their several respective and corporal oaths, and according to the best and utmost of their several and respective knowledge, remembrance, information, and belief, full, true, direct, and perfect answer make to this your orator's bill, and to all the statements and matters and things aforesaid.

And that it may be declared by the decree of this court that your orator is the owner in fee and, as against the Milwaukee and St. Paul Railway Company, entitled to the immediate possession and use of the said eastern division of railroad from Milwaukee to Portage City, and of all the rolling stock that was upon the whole La Crosse and Milwaukee railroad at the time of the appointment of the receiver in the said Howard case, hereinbefore
22 mentioned, except the 40 box cars especially described by their numbers in the decree of sale in the said western division mortgage foreclosure suit.

That an account may be stated in such manner as the court shall direct, ascertaining the exact amount of net earnings of said western division mortgage premises, to wit: said railroad from Portage City to La Crosse, and rolling stock and franchises pertaining thereto, and of the said eastern division mortgaged premises, to wit: the railroad from Milwaukee to Portage City, and the rolling stock and franchises pertaining thereto, respectively, between the time of the first appointment of the receiver in the said Howard case, and the date of said final decree of foreclosure and sale in the said western division mortgage foreclosure suit; or during such other term as this court shall determine was meant or intended in said decree last mentioned in that behalf; and that thereupon, according to the principle of and basis fixed by said last-named decree, it may be adjudged and definitely determined and declared by this court what proportion of rolling stock purchased by the receiver really and equitably belongs to your orator and the said Milwaukee and St. Paul Railway Company, respectively; and that a separation and division thereof may be decreed and determined between your orator and the Milwaukee and St. Paul Railway Company, according to the respective rights to be declared by the court as aforesaid; or that the whole of said rolling stock purchased by said receiver may be ordered to be sold, and the avails thereof divided between your orator and the said Milwaukee and St. Paul Railway Company, according to their respective rights, when ascertained and declared herein; or that your orator may have in that behalf such other or further relief as the nature of the case may require, and as shall be agreeable to equity and good conscience.

That an account may be stated between your orator and the said Milwaukee and St. Paul Railway Company, or otherwise, and in such manner and form as this court shall direct of and concerning the proper and reasonable rent which in equity the Milwaukee and St. Paul Railway Company ought to pay your orator for the use of your orator's rolling stock upon said western division, as hereinbefore stated, since the 12th day of June, 1863, down to and including the time when such account shall be stated, or down to such time as the said Milwaukee and St. Paul Railway Company shall cease to so use the same, including the proper rent for your orator's portion of the said rolling stock purchased by the said receiver as aforesaid; and that your orator may have the judgment and decree of this court against the said Mil-
23 waukee and St. Paul Railway Company for the amount so ascertained, to be paid to your orator or to the said receiver in the said eastern division mortgage foreclosure suit as this court shall determine, within such reasonable time as this court shall determine; or that in default thereof execution may issue against the said Milwaukee and St. Paul Railway Company in such form and effect as this court shall determine.

And that the said Milwaukee and St. Paul Railway Company may be by the decree of this court perpetually restrained and enjoined from setting up or pretending any right, title, or ownership to or interest in said eastern division from Portage City to Milwaukee, under said western division mortgage foreclosure suit sale except the right to run its trains over said eastern division in the same way that your orator has a right to run its trains over said

western division; and that the said Milwaukee and St. Paul Railway Company may be, as aforesaid, perpetually enjoined from claiming any right, title to, or interest in any part of said rolling stock that was on said railroad when said receiver was appointed, as aforesaid, except said forty box cars which are hereinbefore specially described by numbers; and that said Milwaukee and St. Paul Railway Company may be as aforesaid perpetually enjoined and restrained from claiming any right or title to or interest in or control over any part of the said rolling stock purchased by the said receiver as aforesaid except that part thereof which may be ascertained, and determined by the decree of this court in the manner aforesaid to belong to it, said Milwaukee and St. Paul Railway Company.

That pending this bill, and that until the final ascertainment and declaration by this court of the respective rights of your orator and the Milwaukee and St. Paul Railway Company respectively in the premises, and until the further order of this court in this cause, your orator may have the writ of injunction issuing out of and under the seal of this court in due form of law, and according to the practice of said court, to be directed to the said Milwaukee and St. Paul Railway Company, its president, directors, officers, employees and agents, attorneys, solicitors, and counsel, restraining them, and each and every of them, under a certain penalty therein to be named, until the further order of said court, in this cause, from intermeddling with or claiming any right to use, operate, or control the said eastern division of said road from Milwaukee to Portage City, the depot buildings, turn-outs, side tracks, workshops, repair shops, and other buildings, material or other property pertaining to said eastern division, and any part of the said
24 rolling stock which was on said La Crosse and Milwaukee railroad at the time of the first appointment of said receiver, as hereinbefore stated, except the said forty box cars, and any part of the said rolling stock purchased by the said receiver as hereinbefore stated, and from claiming or taking, receiving or having, anyof the issues, rents, tolls, and profits arising therefrom, except that the Milwaukee and St. Paul Railway Company may run its train of cars composed of rolling stock, other than that above mentioned, over the said railroad from La Crosse to Milwaukee.

And that pending this bill and until the further order of this court herein, the said Milwaukee and St. Paul Railway Company, its officers, agents, and employees, may be restrained as aforesaid by injunction to be issued as aforesaid, from using any portion of the said rolling stock which was on said railroad when said receiver was first appointed, or which was purchased by said receiver as hereinbefore stated, upon any other track or line of railroad except upon the said La Crosse and Milwaukee railroad so called, and from using the same at all.

And that as to the said rolling stock purchased by the said receiver as hereinbefore stated, and as to the ownership of which the rights of your orator and the Milwaukee and St. Paul Railway Company are undetermined, as hereinbefore stated, a receiver may be appointed, with direction to hold the same or use the same as this court shall direct, until the rights of the Milwaukee and St. Paul Railway Company and your orator, respectively, thereto, shall be ascertained and declared by the final decree of the court herein, or that the said Hans Crocker, receiver as aforesaid, be ordered to take, hold, use, and operate all of said rolling stock so purchased by him, and pay the revenues and earnings thereof into this court monthly, until the further order of this court.

And that pending this bill, and until the further order of this court, a receiver be appointed of all the said rolling stock that was on said La Crosse and Milwaukee railroad when the said receiver was first appointed, except the said forty box cars hereinbefore mentioned and described by numbers,

and that the said receiver so to be appointed be ordered, or that Hans Crocker be peremptorily ordered, to take immediate possession of all of said rolling stock that was on said La Crosse and Milwaukee railroad at the time the said receiver was first appointed, except said forty box cars, and to use and operate the same upon the whole line of railroad from Milwaukee to La Crosse as a continuous road according to the true intent and meaning of the charter of the La Crosse and Milwaukee Railroad Company
25 and that the said receiver bring the revenues thereof and rents therefrom into court on the 15th day of every month to abide the further order of the court; or that your orator may have in that behalf, by provisional injunction or otherwise, such other and further relief in that behalf as the nature of its case may require, and as shall be agreeable to equity. And that your orator may have the benefit of the report of said master and special masters, the order of said court confirming the same with modification, and the final decree in said western division mortgage foreclose suit, and that the principle thereof as to the ownership of said rolling stock and the amount thereof covered by the said western division mortgage, may be fully carried out and executed.

May it please your honors to grant unto your orators the writ of subpœna, under the seal of this court in due form of law, to be directed to James T. Soutter and Shepherd Knapp, survivors of Greene C. Bronson, deceased, William Wallace Pratt, William White, and the Milwaukee and St. Paul Railway Company, commanding them, by a certain day and under a certain penalty therein to be named, to be and appear before your honors in said court, to answer the premises, and to stand to and abide by such order or decree in this cause as may be agreeable to equity and good conscience, and as your orator will always pray.

MATT. H. CARPENTER,
Sol. for the Mil. & Minn. R. R. Co., Complainant.

MATT. H. CARPENTER, *of Counsel.*

26 *Exhibit No. 1.—Trust deed.*

This indenture, made the twenty-first day of June, in the year of our Lord eighteen hundred and fifty-eight, between the La Crosse and Milwaukee Railroad Company, a corporation created by the legislature of the State of Wisconsin, party of the first part, and William Barnes, of the city of Albany, and State of New York, trustee as hereinafter mentioned, party of the second part.

Whereas the said railroad company, for the purpose of providing for and securing the payment of its floating debt, and for other purposes, has determined to issue its bonds for a sum not exceeding two millions of dollars in the aggregate, embracing one thousand bonds of one thousand dollars each, fourteen hundred bonds of five hundred dollars each, and three thousand bonds of one hundred dollars each, with interest warrants in the usual form attached, and which bonds will be substantially in the following form, to wit:

United States of America, State of Wisconsin.

No —. $——

Know all men by these presents, that the La Crosse and Milwaukee Railroad Company, for value received, acknowledge itself indebted to the bearer thereof, in the sum of ——— dollars, which sum it agrees to pay to the bearer hereof on the first day of July, in the year of our Lord one thousand eight hundred and eighty-eight, at the Albany Exchange Bank, in the city of Albany, with interest, at the rate of seven per cent. per annum, payable a

the Albany Exchange Bank, in the city of Albany, semi-annually, on the first day of January and the first day of July in each year, on presentation or delivery of the interest warrants or coupons hereto annexed. This is one of a series of bonds, all of the same tenor, making in the aggregate the sum of two millions of dollars, for securing the payment of which a trust deed has been executed by said company to William Barnes, of the city of Albany, and State of New York, conveying to him (subject to certain charges thereon) the railroad of said company, commencing in the city of Milwaukee, and running from thence to La Crosse, a distance of about two hundred miles, part of which road has been constructed and is now in full operation, and the residue is in process of construction, together with the equipments and all other things pertaining, or which may hereafter pertain, to the road so conveyed, reference to which deed is hereby had and made for a more full description of its contents. And for further securing and providing for the payment of said bonds, the said deed of trust provides for the creation of a sinking fund, the first payment of $25,000 to which is to be made by said company to William Barnes, of Albany, the trustee named in said deed of trust, on the first day of July, eighteen hundred and sixty-one, and thereafter a like sum annually, with which sum, as from time to time paid, the said trustee is to purchase outstanding bonds secured by said deed of trust, as is more particularly specified in said deed of trust, to which reference is hereby made.

In witness whereof, said railroad company has hereunto affixed its corporate seal, and caused the same to be signed by the president and secretary, this 21st day of June, in the year of our Lord one thousand eight hundred and fifty-eight.

—— ——, *President.*
—— ——, *Secretary.*

Registered and countersigned this —— —— 185 .

—— ——, *Trustees.*

And whereas said railroad company has determined to secure the payment of said bonds, with the interest thereon, in the manner herein provided:

Now, therefore, this indenture witnesseth that said railroad company, in consideration of the premises and the sum of one dollar paid by said party of the second part, has granted, bargained, sold, conveyed, and confirmed, and does by these presents grant, bargain, sell, convey, and confirm, unto said party of the second part all and singular the railroad of said company, commencing in the city of Milwaukee, and running from thence to La Crosse, a distance of about two hundred (200) miles, a part of which road has been constructed and is now in full operation, and the residue is in process of construction, including all and singular the several tracts, pieces, or parcels of land which now are, or hereafter may be, or constitute the site of the roadways, turn-outs, engine-houses, workshops, depots, and other buildings, and all the other lands and real estate which now constitute or may here after constitute or be a part of or appertain to said railroad; and also all and singular the superstructure of said railroad, whether now made or to be made hereafter, and all the engine-houses, workshops, depots, and other buildings, and all the other improvements on or appertaining to said railroad, whether now built or made, or to be built or made hereafter; and also all and singular the locomotive engines and other rolling stock, and all the other equipments of every kind and description which have already been or may hereafter be procured for or used on said railroad, and all the materials, tools, implements, and utensils and other personal property which have been or may hereafter be procured for or used in connection with said rail-

road; and also all and singular the rights, liberties, and privileges and franchises of said railroad company, so far as they relate to said railroad from Milwaukee to La Crosse.

And it is hereby declared to be the intention of the parties to these presents to convey to and vest in said party of the second part all the property, real and personal, of said railroad company to be acquired hereafter, as well as that which has been already acquired, together with all the
27 rights, liberties, privileges, and franchises of said railroad company, in respect to said railroad from Milwaukee to La Crosse, as fully and amply as the same might be conveyed if said railroad had already been fully constructed and equipped, excepting, however, any lands which now do or hereafter may belong to said company under any grant from the United States or the State of Wisconsin; subject, nevertheless, to lines already existing upon the said property and franchises above mentioned as follows: to a first mortgage upon the eastern division of the said road, between Milwaukee and Portage City, to secure outstanding bonds of said company, to the amount of about nine hundred and twenty-two thousand dollars; also bonds to the city of Milwaukee to the amount of three hundred and fourteen thousand dollars; also to bonds secured by second mortgages on said eastern division, subject to the amount of one million dollars; also subject to a mortgage of four million dollars, upon the line of said road from Portage City to La Crosse, and to a second mortgage of about two hundred thousand dollars on the road from Portage City to La Crosse, and from the junction near the village of Tomah, to the terminus of the road on the lakes or river St. Croix. To have and to hold all and singular the property, real and personal, with the hereditaments and appurtenances, and all and singular the rights, liberties, and franchises hereby conveyed, or intended to be conveyed, subject to the aforesaid mortgages, to the aforesaid party of the second part and his successor, and his heirs and assigns forever; in trust, nevertheless, and upon the trusts, terms, and conditions herein expressed:

First. Until default shall be made in the payment of said bonds or some of them, or the interest thereon, said railroad company shall be suffered and permitted to hold and enjoy the said railroad, with all the equipments and all other things appertaining to the same, and to use the same, and to take and receive the profits thereof to its own use, in the same manner as though this deed had not been made.

Second. In case default for the space of 15 days shall be made on the payment of any of said interest warrants or coupons as they respectively fall due, or if default for the like period shall be made in the payment at maturity of the principal sum of money mentioned in any of the said bonds, then and in either of said cases it shall be lawful, and said trustee is hereby authorized in his discretion, either in person or by his attorney or attorneys, agent or agents, to enter into and upon and take possession of all and singular the railroad and all the other property, real and personal, hereinbefore conveyed or intended to be conveyed, and to take and receive the income and profits thereof, and to sell all and singular said railroad and other property, with all the rights, liberties, privileges, and franchises of said railroad company in respect to said railroad, either at public or private sale, and to execute and deliver to the purchaser or purchasers deeds and conveyances, which shall vest in such purchaser or purchasers all the estate, right, title, and interest, whether legal or equitable, of said trustee and said railroad company of, in, or to said property, rights, liberties, privileges, and franchises, and every part and parcel thereof.

But before any sale shall be made at auction, notice of such intended sale shall be published once in each week for three weeks at the least in

two newspapers published in the city of New York, and in a newspaper published in the city of Milwaukee, and should any further notice be required by the laws of the State of Wisconsin, the same shall be given.

And in case default shall at any time be made in the payment of the interest on the bonds then outstanding, or in case default shall be made in the payment of the principal sum of money mentioned in said bonds, or any of them, at maturity, then, and in either of said cases, said trustee, on the written request of the holder or holders of bonds then outstanding, to the amount, in the aggregate, of one hundred thousand dollars, shall proceed to make such sales and conveyances so as above mentioned.

Third. Said railroad company covenants and agrees to and with said trustee and his successor, that said company will, from time to time, during the continuance of the trust, make, execute, and cause to be duly recorded, and deliver to said trustee, all such further conveyances and assurances, and will do all such further acts and things as may be either necessary or proper for more effectually vesting in said trustee all such right, title, interest, or estate, both legal equitable, as said railroad company now has, or may hereafter acquire, of, in, or to all and every part of the property hereby conveyed, or intended to be conveyed, together with the rights, liberties, privileges, and franchises aforesaid.

Fourth. Said railroad company will cause this indenture to be duly recorded in all proper places, and will do whatever else may be necessary or proper to give full effect to the conveyance, and will pay and discharge all taxes, charges, liens, and other burdens which either exist or may hereafter arise or be imposed upon the property hereby conveyed, or intended to be conveyed, and the trustee assumes no duty or responsibility on these subjects, or any of them, nor in relation to any other matter or thing, except as herein provided.

Fifth. This trust extends only to such bonds as shall be registered and countersigned by the trustee, and when all of said bonds shall be satisfied and discharged the trust shall cease. The trust shall also cease at the end of six calendar months after the principal moneys shall fall due, as to all such bonds as shall not then have been presented for payment. And whenever the trust shall determine, and any monies which may be due to the trustee shall be paid, the trustee will reconvey to said railroad company all this right, title, and interest of, in, and to the trust property.

Sixth. Said railroad company will, from time to time, pay all costs, charges, expenses, and compensation of the trustee, in, about, or for the execution of the trust, and will in all things keep him fully indemnified and saved harmless of, from, and against all damages. costs, charges, and expenses which he may sustain or be part to in consequence of accepting this trust, or of anything which may be done or omitted under it, saving only such damages as may arise from the culpable act or neglect of the trustee.

Seventh. And the said railroad company agree to establish and provide a sinking fund for the gradual redemption and payment of said bonds, and for that purpose will pay to the said trustee, on the first day of July, eighteen hundred and sixty-one, and annually thereafter until this trust is closed, the sum of twenty-five thousand dollars, with such sum as, from time to time, the same shall be paid, the said trustee shall from time to time purchase outstanding bonds secured by this deed of trust, at the lowest price
28 he can purchase the same for, first giving ten days' public notice in one or more newspapers published in New York, Albany, and Milwaukee, respectively, of his desire to purchase so many of said bonds as can be obtained for the money of said sinking fund then in his hands, and all bonds so purchased, belonging to said sinking fund, shall be retained by said trustee until this trust be closed.

Eighth. The trustee is hereby authorized to appoint all such attorneys, counsellors, clerks, and other agents as he may deem proper in the execution of the trust, and shall not be answerable for the defaults or other misconduct of such attorneys, counsellors, or other agents, unless chargeable with culpable negligence in their selection; nor shall the trustee be responsible for anything short of gross negligence or wilful default in the discharge of any of his duties.

Ninth. All moneys which may be received by the trustee under trust, after deducting therefrom all costs, counsel fees, charges, and other expenses of the trustee, and his compensation for executing the trust, shall be applied to the payment of the bonds which may be issued under the trust, and the surplus, if any, shall be paid to said railroad company.

Tenth. The supreme court of the State of New York may remove the trustee on the application of the railroad company, reasonable notice being first given to said trustee. The trustee may resign his trust, and be thenceforwad discharged from all further duty or obligation in relation thereto: provided, such resignation, after reasonable notice to the president or secretary of said railroad company, shall be approved by said supreme court. And on the death, removal, or resignation of a trustee, said supreme court may appoint a new trustee, who shall thereupon acquire and have all the right, title, interest, and authority under the trust, and be subject to all duties and responsibilities under the same, as fully as though he had been the original trustee and had executed this deed.

Eleventh. Said trustee hereby accepts and covenants, and agrees to and with said railroad company faithfully to execute said trust.

In witness whereof, said railroad company has hereto affixed its [SEAL.] corporate seal, and caused the same to be subscribed by its president and secretary, and the trustee has subscribed his name and affixed his seal the day and year first above written.

La Crosse and Milwaukee Railroad Company, by—
N. P. STANTON, *President.*
LOCKWOOD L. DOTY,
Secretary of the La Crosse and Milwaukee Railroad Company.
WILLIAM BARNES, *Trustee.* [SEAL.]

Signed, sealed, executed, and delivered in our presence as to the La Crosse and Milwaukee Railroad Company, by N. P. Stanton, president, and as to William Barnes, the said trustee.

CLARK, B.
J. C. CARY.

Signed, executed, and delivered in our presence, as to Lockwood L. Doty, secretary of said La Crosse and Milwaukee Railroad Company.

EDWARD P. WHALING.
P. M. JOHNSON.

STATE OF NEW YORK, *County of Albany:*

Be it remembered, that on this second day of July, in the year one thousand eight hundred and fifty-eight, before me, the subscriber, a commissioner in and for said State, appointed by the governor of the State of Wisconsin to take the acknowledgment and proof of the execution of deeds and other conveyances or leases, and of any contract, letter of attorney, or other writing, under seal or not, administer oaths, and take and certify depositions to be used or recorded in the State of Wisconsin, appeared Nehemiah P. Stan-

ton, described in and who executed the above instrument in writing as the president of and in behalf of the La Crosse and Milwaukee Railroad Company, and acknowledged that he executed the said instrument as president as aforesaid, freely, for the purposes therein stated. And I certify that the said person who made the said acknowledgment is personally known to me to be the individual described in and who executed the said instrument. And the said Nehemiah P. Stanton, being by me duly sworn, says that he is the president of the La Crosse and Milwaukee Railroad Company, the above-named corporation, and that the seal affixed to the above instrument is the corporate seal of the said corporation, and that the said corporate seal and his signature were affixed to said instrument by the authority and direction of said corporation, and by order of the board of directors thereof.

In testimony whereof, I have hereunto set my hand and seal of-
[SEAL.] ficial, at my office, No. seventy-one State street, in the city of Albany, the day and year first above written.

Given under my hand and official seal the day and year above written.

EDWARD WADE,
Commissioner of the State of Wisconsin in and for the State of New York.

STATE OF NEW YORK, *County of Albany, ss:*

Be it remembered, that on the second day of July, in the year one thousand eight hundred and fifty-eight, before me, the subscriber, a commissioner in and for said State, appointed by the governor of the State of Wisconsin to take the acknowledgment and proof of the execution of deeds or other conveyances or leases, and of any contract, letter of attorney, or other writing, under seal or not, administer oaths, and take and certify depositions to be used or recorded in the State of Wisconsin, appeared William Barnes, described in and who executed the above instrument of writing between him as one of the parties thereto and the La Crosse and Milwaukee Railroad
29 Company, the other party thereto, and the said William Barnes acknowledged that he executed the said instrument freely for the purposes therein stated. And I certify that the person who made the said acknowledgment is personally known to me to be the individual described in and who executed the said instrument.

In testimony whereof, I have hereunto set my hand and seal of-
[SEAL.] ficial, at my office, No. seventy-one State street, in the city of Albany, the day and year first above written.

Given under my hand and official seal the day and year above written.

EDWARD WADE,
Commissioner of the State of Wisconsin in and for the State of New York.

STATE OF WISCONSIN, *County of Milwaukee, ss:*

Be it remembered, that on this seventh day of July, eighteen hundred and fifty-eight, before me personally appeared Lockwood L. Doty, to me well and personally known to be the person described in and who executed the above instrument in writing as secretary of and in behalf of the La Crosse and Milwaukee Railroad Company, and acknowledged that he executed the same freely, and as the free act and deed of the said La Crosse and Milwaukee Railroad Company, for the uses and purposes therein mentioned. And the said Lockwood L. Doty, being by me duly sworn, says that he is the secretary of the La Crosse and Milwaukee Railroad Company, the above-named

corporation, and that the seal affixed to the above instrument is the corporate seal of the said corporation, and that the said corporate seal and his signature were affixed to said instrument by the authority and direction of said corporation, and by order of the board of directors thereof.

In testimony whereof, I have hereunto set my hand and affixed [SEAL.] my notarial seal.

E. MARINER,
Notary Public, Milwaukee county, Wisconsin.

Recorded July 8th, 1858, at 8 o'clock a. m.

30 *Exhibit No. 2.*

Indenture made the eleventh day of August, one thousand eight hundred and fifty-eight, between the La Crosse and Milwaukee Railroad Company, a corporation created by the legislature of the State of Wisconsin, party of the first part, and William Barnes, of the city of Albany, and State of New York, trustee as hereinafter mentioned, and under and by virtue of an indenture made by and between said corporation and said Barnes, on the twenty-first day of June, one thousand eight hundred and fifty-eight, party of the second part:

Whereas the Congress of the United States, by an act approved June 3d, 1856, entitled "An act granting public lands to the State of Wisconsin, to aid in the construction of railroads in said State," did enact as follows:

SECTION 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That there be, and is hereby, granted to the State of Wisconsin, for the purpose of aiding in the construction of a railroad from Madison or Columbus, by the way of Portage City, to the St. Croix River or Lake, between townships twenty-five and thirty-one, and from thence to the west end of Lake Superior and to Bayfield; and also from Fond du Lac, on Lake Winnebago, northerly to the State line, every alternate section of land, designated by odd numbers, for six sections in width on each side of said roads, respectively. But in case it shall appear that the United States have, when the line or routes of said roads are definitely fixed, sold any sections or parts thereof granted as aforesaid, or that the right of pre-emption has attached to the same, then it shall be lawful for any agent or agents, to be appointed by the governor of said State, to select, subject to the approval of the Secretary of the Interior, from the lands of the United States nearest to the tier of sections above specified, as much land in alternate sections or parts of sections as shall be equal to such lands as the United States have sold or otherwise appropriated, or to which the right of pre-emption has attached as aforesaid, which land thus selected in lieu of those sold and which pre-emption has attached as aforesaid, together with the sections and parts of sections, designated by odd numbers as aforesaid and appropriated as aforesaid, shall be held by the State of Wisconsin for the use and purpose aforesaid: *Provided*, That the lands to be so located shall in no case be farther than fifteen miles from the line of the roads in each case, and selected for and on account of said roads: *Provided further*, That the lands hereby granted shall be exclusively applied in the construction of the road for which it was granted and selected, and shall be disposed of only as the work progresses, and the same shall be applied to no other purpose whatsoever: *And provided further*, That any and all lands reserved to the United States by any act of Congress, for the purpose of aiding in any object of internal improvement, or in any manner for any purpose whatever, be, and the same are hereby, reserved to the United States from the operation of this act, except so far as it may be found necessary to locate the route of said railroad through such reserved lands, in

which case the right of way only shall be granted, subject to the approval of the President of the United States.

Sec. 2. *And be it further enacted*, That the sections and parts of sections of land, which by such grant shall remain to the United States, within six miles on each side of said roads shall not be sold for less than double the minimum price of the public lands when sold, nor shall any of the said lands become subject to private entry until the same have been first offered at public sale at the increased price.

Sec. 3. *And be it further enacted*, That the said lands hereby granted to said State shall be subject to the disposal of the legislature thereof, for the purposes aforesaid, and no other, and the said railroads shall be and remain public highways, for the use of the government of the United States, free from toll or other charge upon the transportation of property or troops of the United States.

Sec. 4. *And be it further enacted*, That the lands hereby granted to said State shall be disposed of by said State only in the manner following, that is to say, that a quantity of land not exceeding one hundred and twenty sections, and included within a continuous length of twenty miles of road respectively, may be sold, and when the governor of said State shall certify to the Secretary of the Interior that any twenty continuous miles of either of said roads are completed, then another like quantity of land hereby granted may be sold, and so from time to time until said roads are completed; and if said roads are not completed within ten years, no further sales shall be made, and the land unsold shall revert to the United States.

Sec. 5. *And be it further enacted*, That the United States mail shall be transported over said road, under the direction of the Post Office Department, at such price as Congress may by law direct: *Provided*, That until such price is fixed by law, the Postmaster General shall have the power to determine the same.

Approved June 3d, 1856.

And whereas the legislature of the State of Wisconsin subsequently passed an act, approved October 11, 1856, which is in the following words: 'An act to grant certain lands to the La Crosse and Milwaukee Railroad Company, and to execute the trust created by an act of Congress, entitled "An act granting public lands to the State of Wisconsin to aid in the construction of railroads in said State,' approved June 3, 1856." The people of the State of Wisconsin, represented in senate and assembly, do enact as follows:

Section 1. The La Crosse and Milwaukee Railroad Company is hereby authorized and empowered to survey, locate, construct, complete and perpetually to have, use, maintain and operate railroads, with one or more tracks or lines from the city of Madison, in the county of Dane, and from the village of Columbus, in the county of Columbia, on the most direct and feasible route, by the way of Portage City to the St. Croix River or Lake, between townships twenty-five and thirty-one, and from thence to the west end of Lake Superior and to Bayfield, and shall have, possess, exer-
31 cise, and enjoy the same rights, privileges, functions, franchises, authority, and immunities with reference to the said routes, or any railrord to be built thereon, as it now possesses and enjoys with reference to any route it is now authorized to occupy, or any railroad built, or to be built, thereon; and there is hereby conferred upon the La Crosse and Milwaukee Railroad Company, all the power and authority contained in the charter of said company, and in the acts amendatory thereof, for the purpose of carrying out the objects of this act, and of appropriating and applying the lands hereinafter in this act granted, or their proceeds, to aid in the construction of railroads by this act authorized to be built.

Sec. 2. The said roads shall be constructed on the most direct and feasi-

ble routes from Madison to Portage City, and from Columbus to Portage City, and simultaneously, as nearly as practicable, and both of them shall be completed by the last day of December, A. D. 1858. And for the purpose of estimating and selecting lands granted by Congress, the city of Madison is hereby designated as the point of commencement of said road, and the whole of the railroad hereby authorized to be constructed shall be constructed by said La Crosse and Milwaukee Railroad Company within ten years from the 3d day of June, 1856.

SEC. 3. The said La Crosse and Milwaukee Railroad Company shall never set up the defence of usury to any contract, in any court whatsoever; it may purchase its own rails, chairs, spikes, engines, tenders, cars, and all other things necessary and useful for the construction or operation of a railroad, and sell the same, and shall also have power and authority to operate its said roads, or either of them, in connection with any and all other railroads which may cross, come up to, or connect with the said railroads, or either of them, upon such terms as shall be mutually agreed upon by and between the said companies: *Provided, however,* That the said La Crosse and Milwaukee Railroad Company, in making any such contract as last aforesaid, shall give no preference to one company over any other such company or companies, as last above mentioned, but all such companies shall be put upon the same equal terms: *And provided also,* That if the said La Crosse and Milwaukee Railroad Company, and such other railroad company as may desire a running connection with the same, shall at any time not be able to agree upon the terms of such connections, then and in that case either party may apply to the circuit court of the circuit in which such connection may be sought, and the said circuit court shall appoint three commissioners, whose duty it shall be forthwith to proceed to examine and adjust the terms on which the said connection shall exist, and the said award of terms of connection shall be filed in the office of the secretary of state, and shall be binding on both parties for the term of two years. Such application shall be on not less than ten days' notice in writing, to be given by the party making such application to the adverse party.

SEC. 4. For the purpose of aiding in the construction of the railroads which by this act the said La Crosse and Milwaukee Railroad Company is authorized to construct, all the interest and estate, present or prospective, of this State in or to any and all the lands granted by the government of the United States to the State of Wisconsin, for the purpose of aiding in the construction of a railroad from Madison or Columbus, by way of Portage City, to the St. Croix River or Lake, between townships twenty-five and thirty-one, and from thence to the west end of Lake Superior and to Bayfield, by virtue of an act of Congress entitled "An act granting a portion of the public lands in the State of Wisconsin to aid in the construction of railroads," approved June 3, 1856, together with all and singular the rights, privileges, and immunities conferred, or intended to be conferred, by the said act of Congress, are hereby granted to the said La Crosse and Milwaukee Railroad Company: *Provided,* That the said land shall be exclusively applied in the construction of that road for which it was granted and selected, and shall be disposed of only as the work progresses, and the same shall be applied to no other purpose whatever: *And provided further,* That the title to said lands shall vest in the said La Crosse and Milwaukee Railroad Company in the manner following, that is to say, whenever twenty continuous miles of said road shall have been completed, so as to admit of running regular trains on the same, the governor of this State shall certify to the Secretary of the Interior the fact that such twenty continuous miles of such roads are completed as aforesaid, then the title to two hundred and

forty sections of said lands shall vest in the La Crosse and Milwaukee Rail road Company; and when a second continuous twenty miles of said road shall have been completed, so as to admit of running regular trains of cars on the same, the governor shall certify as before, and thereupon a further quantity of one hundred and twenty sections of said land shall vest in said company; and so from time to time until said roads are completed. And it shall be the duty of the governor so to certify to the Secretary of the Interior whenever such twenty miles are completed so as to admit running regular trains of cars on the same; and the governor of the State shall in his official capacity, and on behalf of the State, and under the great seal thereof, execute and deliver to the La Crosse and Milwaukee Railroad Company, whenever it shall by virtue of the provisions of this charter be entitled to any of said lands, a deed in fee simple of any and all the lands to which said company shall be entitled: *Provided*, That said company shall not sell any of said lands until twenty miles of said road shall be completed, so as to admit of running regular trains over the same, and so on from time to time, so that the sales of land by said company shall never exceed six sections of land for every mile of road so completed.

SEC. 5. The location and designation of the route and line of the said roads shall be made by the said La Crosse and Milwaukee Railroad Company, and the same shall, from time to time, and as fast as practicable, be reported to the governor of the State. The selection of lands provided for in the act of Congress, hereinbefore mentioned, shall be made by such agents as may be appointed by the governor of the State. Such selection, as well as the survey, location, and completion of said roads, and the compensation of such agents, shall be at the cost and charge of said company, without charge of any kind upon the treasury of the State of Wisconsin. Said railroads, which shall be constructed by the application of funds derived from the lands herein granted, shall be and remain public highways for
32 the use of the government of the United States, free from any toll or other charge upon the transportation of property or troops of the United States; and the United States mail shall be transported over said roads under the direction of the Post Office Department, as provided in said act of Congress.

SEC. 6. In consideration of the grants, privileges, and franchises herein conferred upon the said La Crosse and Milwaukee Railroad Company, for the purposes aforesaid, the said company shall, on or before the first day of March in each year, pay into the treasury of the State such sum as it is by the existing laws of the State required to pay in place of taxes upon its road now constructed, or which it may hereafter construct, under the present charter, and in addition thereto it shall pay into the treasury of the State, on or before the first day of March in each year, four per centum on the gross earnings of said road to be built by said company in pursuance of the power and authority conferred by this act, for the year ending on the last day of the preceding December, in place of taxes on that portion of its said railroad so to be constructed; and for the purpose of ascertaining the gross earnings aforesaid, an accurate account of such earnings shall be kept by said company, an abstract whereof shall be furnished by said company to the treasurer of this State, on or before the first day of February in each year, the truth of which abstract shall be verified by the affidavits of the treasurer and secretary of said company; and for the purpose of ascertaining the truth of such affidavits, and the correctness of such abstracts, full power is vested in the governor of this State, or any other person appointed, as may be by law prescribed, to examine the books and papers of said company, and to examine under oath the officers, agents, and employees of the said company and other persons; and if any person so examined by the governor, or other authorized person, shall knowingly or willfully swear falsely concerning the matter aforesaid, every such person is hereby declared to have com-

mitted perjury; and for securing to the State the payment of the aforesaid per centum, it is hereby declared that the State shall have a lien upon the railroad of the said company, and upon all other property, estate, and effects of said company, whether real, personal, or mixed, and the lien hereby secured by the State shall take and have precedence of all demands, decrees, and judgments against the said company.

The first payment shall be made on the first day of March next, after fifty miles of said road shall be completed, and such payment shall be in lieu and in full of all claims of the State for the grant hereby made, and in consideration of such annual payment the said company shall be forever exempt from all assessments and taxes whatever by the State, or by any county, town, city, village, or other municipal authority in the State, (except special taxes for the improvement of streets and sidewalks,) upon all stock in the said La Crosse and Milwaukee Railroad Company, whether belonging to said company or to individuals, or any of its franchises or estate, real, personal, or mixed, held by said company, and necessary for the operation of said railroad; and said lands granted by said act of Congress, and hereby authorized to be conveyed to the La Crosse and Milwaukee Railroad Company, shall be exempt from taxation under and by virtue of the laws of this State for the period of ten years after the passage of this act, unless sooner sold, conveyed, or leased by the said La Crosse and Milwaukee Railroad Company, and the State shall have a prior lien upon the road of said company, and all the appurtenances and stock thereof, for all dues that may accrue to the State from said corporation as herein provided, which lien of the State shall take precedence of all demands, judgments, or decrees against said corporation.

SEC. 7. Within five years after the title of such lands shall become vested in the said railroad company, the same, if any shall remain unsold, shall be offered for sale in limited quantities at fair prices, preference being given to actual settlers.

SEC. 8. The said La Crosse and Milwaukee Railroad Company shall have full power and authority to transport persons and property in boats, vessels, barges, or other water-craft, on any navigable water which any portion of their railroad may run to or connect with, and to receive and collect reasonable compensation for the same, and for that purpose may purchase or build and own such vessels, boats, barges, and other water craft as it may require.

SEC. 9. The said La Crosse and Milwaukee Railroad Company shall be capable in law of taking and holding any lands granted by the government of the United States, or of this State, to aid in the construction of railroads, which shall be conveyed to said company by this act, or by deed, or by operation of law; and may also mortgage or pledge, or otherwise dispose of, all their right, title, claim, or demand of, in, or to any lands, or interest in lands, granted to said company by this act, and in any other estate, real, personal, or mixed, of which they may be seized at the time of execution of such mortgage, or which they may acquire subsequent thereto, in such manner and on such terms as the directors may think proper.

SEC. 10. In case the La Crosse and Milwaukee Railroad Company shall construct the railroad which by this act it is authorized to construct, or any part of it, upon or over any route upon or over which any other railroad company is authorized to construct a railroad, and upon or over which it has previous to the passage of this act actually surveyed or located its line of railroad, it shall be the duty of the La Crosse and Milwaukee Railroad Company to settle with such railroad company, upon principles of justice and equity, for all its property and rights of property which the said La Crosse and Milwaukee Railroad Company shall take, injure, or destroy; and

the latter company shall pay to any such company whose property or rights of property shall be thus taken, injured, or destroyed, whatever the same is reasonably worth; such payment to be made in money, bonds, stock, or lands, or in such other manner as said companies shall mutually agree. And if the said companies cannot mutually agree upon the amount of compensation to be made by the said La Crosse and Milwaukee Railroad Company to such other company for the property and rights of property which said La Crosse and Milwaukee Railroad Company shall so as aforesaid take, injure, and destroy, then and in that case each of said companies shall select a disinterested engineer, and the two engineers so selected shall choose a third person, and in case they cannot agree upon such third person, the governor shall appoint such third person; and the three persons so selected shall constitute a board of commissioners, whose duty it shall be to
33 ascertain, determine, and award the amount of compensation which the said La Crosse and Milwaukee Railroad Company ought, in justice and equity, to make to such other railroad company for the property and rights of property which shall be so as aforesaid taken, injured, or destroyed.

Sec. 11. This act, and all grants herein contained, shall cease and be void, unless the said La Crosse and Milwaukee Railroad Company shall accept of the same within five days after the passage of this act; and such acceptance shall be by a resolution adopted by the directors of said company, a copy of which, duly certified by the secretary of said company, under its corporate seal, within said period of five days from the passage of this act, shall be deposited in the office of the secretary of state. And in case the said La Crosse and Milwaukee Railroad Company shall violate the provisions of this act, the legislature may repeal this act, and may revoke all and singular the rights and franchises herein conferred, so far as the same has not been performed and fulfilled, and so far as the rights and privileges hereby granted have not become complete and absolute.

Sec. 12. All the property which the said La Crosse and Milwaukee Railroad Company is authorized to appropriate, take, possess, hold, use, or enjoy, by making payment thereof, as is in this act provided, is hereby declared to be taken for public use, so soon as the said company shall so appropriate, take, possess, hold, or use the same.

Sec. 13. The capital stock of the La Crosse and Milwaukee Railroad Company is hereby increased two million dollars over and above its present capital, and within three months after the passage of this act said company shall open books for subscription to such increased capital stock, after giving at least thirty days' notice thereof in two newspapers, one published in the city of Milwaukee, and one published in the city of Madison. Such books shall be opened in the city of Milwaukee, and shall be kept open for not less than three days, and all persons shall be permitted to subscribe to said stock on the payment to the treasurer of the company of five per cent. of the amount subscribed in cash; but no one person shall be allowed to subscribe for more than two hundred and fifty shares of such stock; and in case the number of shares subscribed shall exceed the amount of two million dollars, the same shall be reduced to that amount, by deducting such sums as may be necessary pro rata from each of the several subscriptions; and all of the shares of stock so subscribed shall be subject to calls for instalments thereon in like manner as the other stock of said railroad company.

Sec. 14. It is hereby declared that, in the judgment of the legislature of this State, the objects of the corporation named in this act cannot be attained under or by general laws.

Sec 15. The La Crosse and Milwaukee Railroad Company shall fence its road in parcels, as it shall from time to time operate the same, within one

year after it shall commence the operating of any and every such parcel, until the whole of such railroad shall be, in a good, proper, and substantial manner, fenced throughout the entire extent thereof.

SEC. 16. This act is hereby declared to be a public act, and the same shall, immediately after the passage thereof, be printed by the state printer, and when thus published shall take effect and be in force.

And whereas the said railroad company, after the passing of the last-mentioned act, and on the same day, duly accepted the same by a resolution adopted by the directors of said company, a copy of which, certified by the secretary of said company under its corporate seal, was on the same day deposited in the office of the secretary of state:

And whereas the said railroad company, for the purpose of providing for and securing the payment of its floating debt, and for other purposes, had determined before the date of the indenture hereinafter mentioned, dated June 21st, 1858, between said company of the first part, and said Barnes, as trustee, of the second part, to issue its bonds for a sum not exceeding two millions of dollars in the aggregate, embracing one thousand bonds of one thousand dollars each, fourteen hundred bonds of five hundred dollars each, and three thousand bonds of one hundred dollars each, with interest warrants or coupons in the usual form attached:

And whereas, also, the La Crosse and Milwaukee Railroad Company executed and delivered to said party of the second part an indenture, dated on the 21st day of June, A. D. 1858, recorded in the office of the secretary of state of the State of Wisconsin, on the 8th day of July, A. D. 1858, in Book of Railroad Mortgages, on pages 342, 343, 344, 345, 346, 347, 348, by which the said railroad company conveyed to said William Barnes, party of the second part, as trustee for the holders of said bonds as therein particularly specified, all and singular the railroad of said company, commencing in the city of Milwaukee, and running from thence to La Crosse, a distance of about two hundred (200) miles, including all and singular the several tracts, pieces, or parcels of land which constituted or might thereafter constitute the site of the roadways, turn-outs, engine-houses, workshops, depots, and other buildings, and all other lands which might thereafter constitute or be a part of or appertain to said railroad, and also other property, real and personal, and other rights, privileges, liberties, and franchises, as by reference thereto will more fully and at large appear:

And whereas, also, the said indenture contained a covenant and agreement on the part of the said La Crosse and Milwaukee Railroad Company, to make, execute, and deliver to said William Barnes, as trustee as aforesaid, all necessary and proper further conveyances and assurances:

And whereas the said trustee has required the execution and delivery of this further conveyance:

Now, therefore, this indenture witnesseth, that the said La Crosse and Milwaukee Railroad Company, in consideration of the premises, and of the mutual promises herein contained, and the sum of one dollar paid by the said party of the second part to said party of the first part, the receipt of which is hereby confessed and acknowledged, has granted, bargained, sold, conveyed, and confirmed, and does by these presents grant, bargain, sell, convey, and confirm, unto said party of the second part, all and singular the railroad of said company, commencing in the city of Milwaukee, and running from thence to La Crosse, a distance of about two hundred (200) miles,
34 and also the railroad of said company commencing in the village of Madison, and running from thence, by way of Portage City, to the St. Croix River or Lake, a distance of about two hundred and sixty-eight (268) miles, and also the railroad of said company commencing in the village of Columbus, and running from thence to Portage City, a distance of about

forty (40) miles, a part of which roads have been constructed and are now in full operation, and the residue are in process of construction; and all other railroads built or to be built and constructed by said company, or which they have a right to construct by or under any corporate or other rights, privileges, or franchises heretofore granted or given, or which may be hereafter granted or given to said La Crosse and Milwaukee Railroad Company, by the legislature of the State of Wisconsin, or from any other source, or in any other manner whatsoever, including all and singular the several tracts, pieces, or parcels of land which now are or hereafter may be or constitute the site of the roadways, turn-outs, engine-houses, workshops, depots, and other buildings, and all other lands and real estate which now constitute, or may hereafter constitute, or be a part of or appertain to, said railroads, and including also all and singular the lots, lands, and real estate whatsoever, which the said railroad company now own, or which they shall hereafter acquire by purchase, grant, gift, or otherwise, in the cities of Milwaukee and La Crosse, or in the vicinity of either of said cities, and all improvements made or to be made thereon, and all rights of dockage and wharfage, and all other riparian rights, privileges, and franchises appertaining thereto, for a particular description of which lands already acquired reference is made to the various deeds of the same to the said company.

And also all and singular the superstructure of said railroads, whether now made or to be made hereafter, and all the engine-houses, workshops, depots, and other buildings, and all the other improvements on or appertaining to said railroads, whether now built or made or to be built or made hereafter.

And also all and singular the locomotive engines and other rolling stock, and all the other equipments of every kind and description, which have already been, or may hereafter be, procured for or used on said railroads, and all the material, tools, implements, and utensils, and other personal property, which have been or may hereafter be procured for or used in connection with said railroads.

And also all and singular the rights, privileges, liberties, and franchises of said La Crosse and Milwaukee Railroad Company, of every kind and description.

And also the said La Crosse and Milwaukee Railroad Company has granted, bargained, sold, conveyed, and confirmed, and does by these presents grant, bargain, sell, convey, and confirm, unto said party of the second part, all and singular the lands granted, or intended to be granted, to said railroad company, under or by virtue of the act of Congress and the act of the legislature of the State of Wisconsin hereinbefore mentioned, together with all and singular the hereditaments and appurtenances belonging or in anywise appertaining to the lands and real estate hereby conveyed or intended to be conveyed.

And also all and singular the stock, railroad, or other bonds, bills of exchange, promissory notes, accounts, causes of action, demands, and choses in action of whatsoever nature, which may be owned, or in which said railroad company may have an interest, on such day as the said railroad company may first make default in the payment of the interest or principal, or any part thereof, which may hereafter become due on any of the said bonds issued or to be issued by said company.

And it is hereby declared to be the intention of the parties to these presents, to convey to and vest in said party of the second part all the property, real and person and mixed, of said railroad company, to be acquired or vested hereafter, as well as that which has been already acquired or vested, together with all the rights, liberties, privileges, and franchises of said railroad company, as fully and amply as the same might be conveyed if said

railroads had already been fully built, constructed, and equipped, and the particular lands granted by the foregoing acts of Congress and the said legislature had already been fully designated, and duly conveyed and duly patented to said railroad company, according to the provisions of said acts.

And the said La Crosse and Milwaukee Railroad Company, part of the first part, does hereby covenant, grant, bargain, promise, and agree to and with the said party of the second part, and his successors, grantees, and assigns, to warrant and forever defend the above described and granted premises, lands, tenements, and every part and parcel thereof, and also all the property, real, personal, and mixed, now vested or acquired, or hereafter to be vested or acquired, and also all the rights, property, real, personal, and mixed, choses in action, privileges and franchises, above conveyed, or intended to be conveyed, unto the said party of the second part, his successors, grantees, or assigns, against the said party of the first part, and against all and every other person or persons, States, or corporations lawfully claiming or to claim the same or any part thereof, subject, nevertheless, to all legal lines already existing upon the property and franchises above mentioned.

To have and to hold all and singular the said property, real, personal, and mixed, and choses in action, with the hereditaments and appurtenances, and all and singular the rights, liberties, privileges, and franchises. hereby conveyed or intended to be conveyed, subject to the aforesaid existing legal liens, to the aforesaid party of the second part, and his successors, and his heirs and assigns forever.

In trust, nevertheless, and upon the trusts, terms, and conditions herein expressed, and also expressed in the said indenture, made and executed by and between said parties, on the 21st day of June, A. D. 1858.

First. Until default shall be made in the payment of said bonds, or some of them, or in the payment of the interest thereon, or some part thereof, and the said railroad company shall be suffered and permitted to hold and enjoy said railroads, with all the equipments and all other things appertaining to the same, and to use the same, and to take and receive the profits thereof to its own use, in the same manner as though this deed had not been made.

Second. In case of default for the space of fifteen days shall be made in the payment of any of said interest warrants or coupons, as they respectively fall due, or if default for the like period shall be made in the payment at maturity of the principal sum of money mentioned in any of the said bonds, then and in either of the said cases it shall be lawful, and said trustee is hereby authorized in his discretion, either in person or by his attorney or attorneys, agent or agents, to enter into and upon, and take possession of, all and singular the railroads and all the other property, real, personal, and mixed, and choses in action hereinbefore conveyed, or intended to be conveyed, and to take and receive the income and profits thereof, and to take possession of all books, documents, maps, and papers relating thereto, and to sell all and singular said railroads and said other property, real, personal, and mixed, and choses in action, with all the rights, liberties, privileges, and franchises of said railroad company, either at public or private sale, and to execute and deliver to the purchaser or purchasers deeds and conveyances, which shall vest in such purchaser or purchasers all the estate, right, title, and interest, whether legal or equitable, of said trustee and said railroad company, of, in, and to the said property, rights, liberties, privileges, and franchises, and every part and parcel thereof. But before any sale shall be made at auction, notice of such intended sale shall be published once in each week, *for three weeks* at the least, in two newspapers published in the city of New York, and in a newspaper published in the city of Milwaukee; and should any further notice be *required by the laws of the State of Wisconsin, the same shall be given.* And in case default shall at any time be made in the payment of the interest

money of the bonds then outstanding, or in case default be made in the payment of the principal sum of money mentioned in said bonds, or any of them, at maturity, then and in either of said cases said trustee, on the written request of the holder or holders of bonds then outstanding to the amount in the aggregate of one hundred thousand dollars, shall proceed to make such sales and conveyances so as above mentioned.

Third. Said railroad company covenants and agrees to and with said trustee, and his successor, that said company will, from time to time, during the continuance of the trust, make, execute, cause to be duly recorded, and deliver to said trustee all such further conveyances and assurances, and will do all such further acts and things as may either be necessary or proper for more effectually vesting in said trustee all such right, title, interest, or estate, both legal and equitable, as said railroad company now has or may hereafter acquire of, in, or to all and every part of the property hereby conveyed or intended to be conveyed, together with the rights, liberties, privileges, and franchises aforesaid.

Fourth. Said railroad company will cause this indenture to be duly recorded in all proper places, and will do whatever else may be necessary or proper to give full effect to this conveyance, and will pay and discharge all taxes, charges, liens, and other burdens which either exist or may hereafter arise or be imposed upon the property hereby conveyed or intended to be conveyed; and the trustee assumes no duty or responsibility on these subjects or any of them, nor in relation to any other matter or thing, except as herein provided

Fifth. The trustee is hereby authorized to appoint all such attorneys counsellors, clerks, and other agents, in addition to those provided for in said original indenture, executed by and between said parties, on the 21st day of June, 1858, and recorded as above mentioned, as he may deem proper in the execution of the trust, and shall not be answerable for the defaults or other misconduct of said attorneys, counsellors, clerks, or other agents, unless chargeable with culpable negligence in their appointment, nor shall the trustee be responsible for anything short of gross negligence or wilful default in the discharge or omission to discharge of any of his duties.

And it is hereby expressly declared, covenanted, and agreed by the said railroad company, that the provision herein contained for the security of said bonds are in addition to the provisions, liens, and securities made or created in that behalf, in the said original deed of trust or mortgage, executed by and between said parties, bearing date June 21st, 1858, and recorded as aforesaid, and that all such original provisions, liens, and securities are to remain in full force and effect; and also that all provisions in said original deed of trust or mortgage for the benefit or protection of said trustee are to remain in full force and effect, and are to be applicable to all trusts and actions, or omissions to act under this indenture, in the same manner as if all the provision thereof had been inserted and incorporated in said original trust deed or mortgage.

Said trustee hereby accepts and covenants and agrees to and with said railroad company faithfully to execute said trust.

In witness whereof, said railroad company has hereto affixed its corporate seal, and caused the same to be subscribed by its president and secretary, and the trustee has subscribed his name and affixed his seal, the day and year first above written.

{ [SEAL.] La Crosse & Milwaukee R. R. Company. }

La Crosse and Milwaukee Railroad Company, by—
N. P. STANTON, *President.*
LOCKWOOD L. DOTY, *Secretary.*
WILLIAM BARNES, *Trustee.* [SEAL.]

Signed, sealed, executed, and delivered in our presence, as to the La Crosse & Milwaukee Railroad Company, by N. P. Stanton, president.

BYRON KILBOURN.
T. W. BEAVER.

Signed, executed, and delivered in our presence, as to Lockwood L. Doty, secretary of said La Crosse & Milwaukee Railroad Company.

EDWARD P. WHALING.
T. W. BEAVER.

Signed, sealed, executed, and delivered in our presence, as to William Barnes, the said trustee.

JOHN G. WHITE.
ISAAC EDWARDS.

36 STATE OF WISCONSIN, *County of Milwaukee, ss:*

Be it remembered, that on this twenty-fourth day of August, eighteen hundred and fifty-eight, before me personally appeared Nehemiah P. Stanton, described in and who executed the above instrument in writing, as the president of and in behalf of the La Crosse and Milwaukee Railroad Company, and acknowledged that he executed the said instrument as president as aforesaid, freely for the purpose, therein stated. And I certify that the said person who made the said acknowledgment is personally known to me to be the individual described in and who executed the said instrument. And the said Nehemiah P. Stanton, being by me duly sworn, says that he is the president of the La Crosse and Milwaukee Railroad Company, the above-named corporation, and that the seal affixed to the above instrument is the corporate seal of the said corporation, and that the said corporate seal and his signature were affixed to said instrument by the authority and direction of said corporation, and by order of the board of directors thereof.

In testimony whereof, I have hereunto set my hand and seal official, at my office, No. Third street, in the city of Milwaukee, the day and year above written. [SEAL.]

Given under my hand and official seal the day and year above written.

EDWARD P. WHALING,
Notary Public, Milwaukee County, Wisconsin.

STATE OF WISCONSIN, *County of Milwaukee, ss:*

Be it remembered, that on the 24th day of August, eighteen hundred and fifty-eight, before me personally appeared Lockwood L. Doty, to me well and personally known to be the person described in and who executed the above instrument in writing as secretary of and in behalf of the La Crosse and Milwaukee Railroad Company, and acknowledged that he executed the same freely, and as the free act and deed of the said La Crosse and Milwaukee Railroad Company, for the uses and purposes therein mentioned. And the said Lockwood L. Doty, being by me duly sworn, says that he is the secretary of the La Crosse and Milwaukee Railroad Company, the above-named corporation, and that the seal affixed to the above instrument is the corporate seal of the said corporation, and that the said corporate seal and his signature were affixed to said instrument by the authority and direction of said corporation, and by order of the board of directors thereof.

In testimony whereof, I have hereunto set my hand and seal official, at my

[SEAL.] office, No. Third street, in the city of Milwaukee, the day and year above written.

Given under my hand and official seal the day and year above written.

EDWARD P. WHALING,
Notary Public, Milwaukee County, Wisconsin.

STATE OF NEW YORK, *County of Albany, ss:*

Be it remembered, that on the sixteenth day of August, in the year one thousand eight hundred and fifty-eight, before me, the subscriber, a commissioner in and for said State, appointed by the governor of the State of Wisconsin to take the acknowledgment and proof of the execution of deeds or other conveyances or leases, and of any contract, letter of attorney, or other writing, under seal or not, administer oaths, and take and certify depositions, to be used or recorded in the State of Wisconsin, appeared William Barnes, described in and who executed the above instrument of writing between him, as one of the parties thereto, and the La Crosse and Milwaukee Railroad Company, the other party thereto; and the said William Barnes acknowledged that he executed the said instrument freely for the purpose therein stated. And I certify that the said person who made the said acknowledgment is personally known to me to be the individual described in and who executed the said instrument.

In testimony whereof, I have hereunto set my hand and seal official, at my [SEAL.] office, No. seventy-one State street, in the city of Albany, the day and year first above written.

Given under my hand and official seal the day and year above written.

EDWARD WADE.
Commissioner of the State of Wisconsin, in and for the State of New York.

Recorded Sept. 1st, 1858, at 8 o'clock a. m.

37 *Exhibit No. 3.—La Crosse and Milwaukee R. R. Co. to Francis A. Palmer—mortgage.*

This indenture, made the thirtieth day of June, in the year of our Lord one thousand eight hundred and fifty-four, between the La Crosse and Milwaukee Railroad Company, a corporation duly constituted by the laws of the State of Wisconsin, party of the first part, and Francis A. Palmer, of the city of New York, party of the second part, witnesseth: Whereas the said La Crosse and Milwaukee Railroad Company, in pursuance of their corporate powers, are now engaged in constructing a railroad from the city of Milwaukee, on Lake Michigan, to La Crosse, on the Mississippi River, in the State of Wisconsin, and for that purpose, in part, have resolved to raise a sum of money by loan, for the purpose of purchasing iron, rails, and machinery therefor, and of aiding in the construction of said railroad and putting the same into operation; and for the objects and purposes aforesaid, and in order to secure the payment and satisfaction of the moneys to be raised as aforesaid, it is proposed and intended by the said parties of the first part to execute, issue, and deliver five hundred bonds or writings, obligatory, each for the sum of one thousand dollars, to be numbered respectively from number one (1) to five hundred (500) inclusive, and nine hundred bonds, each for the sum of five hundred dollars, to be numbered respectively from number one (1) to nine hundred (900,) inclusive, which bonds are to be in the following form:

of the holders of at least one-half of the bonds then unpaid and unconverted into stock, shall, cause the said premises, property, and effects hereby mortgaged, or intended so to be, or so much thereof as shall be necessary to and discharge the principal and interest of all such of said bonds as may then be unpaid and unconverted as aforesaid, to be sold at public auction, in the city of Milwaukee, in the State of Wisconsin, aforesaid, or in the city of New York, giving at least forty days' notice of the time, place, and terms of such sale, and of the specific property to be sold, by publishing the same in two newspapers of good circulation in each of the cities aforesaid, and wherever else required by law, and execute to purchaser or purchasers thereof a good and sufficient deed of conveyance in fee simple of all said the rate of eight per centum per annum, semi-annually, on the first day of each November and of each May ensuing the date hereof, until the said principal sum shall be paid, on the presentation and delivery of the annexed warrants at said bank. This bond is one of a series of fourteen hundred bonds of the company aforesaid, of even date, to wit: 500 bonds for the sum of $1,000 each, numbered respectively from number 1 to number 500 inclusive, and 900 bonds for the sum of $500 each, numbered respectively from number 1 to number 900, inclusive, amounting in the aggregate to $950,000, secured by a mortgage executed in trust to Francis A. Palmer, of the city of New York, upon that part of the road of said company extending from its eastern termination, in the city of Milwaukee, to Portage City, being 95 miles in distance, together with the property and effects of said company on that part of the road. And said company further agree that this obligation, and all rights and benefits arising therefrom, may be transferred by general or special endorsement, or by delivery, as if the same was a note of hand payable to bearer.

The holder of this bond shall be entitled, at any time within ten years from the date hereof, to convert the principal sum into the stock of the said company, at par, on surrendering this bond, with the interest warrants then not due annexed.

In testimony whereof, the said company have hereunto caused to be affixed their corporate seal, and these presents to be subscribed by their president and secretary, at Milwaukee, the first day of July, 1854.

—— ——, *President.*

—— ——, *Secretary.*

39 I hereby certify that the La Crosse and Milwaukee Railroad Company have executed to me in trust the mortgage referred to in the foregoing bond, and that I have caused the same to be recorded in the several counties wherein said mortgaged premises are situated, and that the foregoing is one of the several bonds described in and secured by said mortgage.

—— ——, *Trustee.*

Now, therefore, this indenture witnesseth, that the said La Crosse and Milwaukee Railroad Company, in consideration of the premises, and in order to secure the payment of the said bonds, agreed that the said party of the second part, his successors in said trust, and assigns, shall only be accountable for reasonable diligence in the management thereof, and shall not be responsible for the acts of any agents employed by him or them, when such agent is selected with reasonable discretion; and that said party of the second
44 part, his successor in said trust, or assigns, shall be entitled to receive proper compensation for any labor or services performed by him in the discharge of his trust, in case he shall be compelled to take possession of said premises or any part thereof, or manage the same. And it is further mutually agreed that in case of the death, mental incapacity, or resignation

[SEAL.] office, No. Third street, in the city of Milwaukee, the day and year above written.

Given under my hand and official seal the day and year above written.

EDWARD P. WHALING,
Notary Public, Milwaukee County, Wisconsin.

STATE OF NEW YORK, *County of Albany, ss:*

Be it remembered, that on the sixteenth day of August, in the year one thousand eight hundred and fifty-eight, before me, the subscriber, a commissioner in and for said State, appointed by the governor of the State of Wisconsin to take the acknowledgment and proof of the execution of deeds or other conveyances or leases, and of any contract, letter of attorney, or other writing, under seal or not, administer oaths, and take and certify depositions, to be used or recorded in the State of Wisconsin, appeared William Barnes, described in and who executed the above instrument of writing between him, as one of the parties thereto, and the La Crosse and Milwaukee Railroad Company, the other party thereto; and the said William Barnes acknowledged that he executed the said instrument freely for the purpose therein stated. And I certify that the said person who made the said acknowledgment is personally known to me to be the individual described in and who executed the said instrument.

In testimony whereof, I have hereunto set my hand and seal official, at my [SEAL.] office, No. seventy-one State street, in the city of Albany, the day and year first above written.

Given under my hand and official seal the day and year above written.

EDWARD WADE.
Commissioner of the State of Wisconsin, in and for the State of New York.

Recorded Sept. 1st, 1858, at 8 o'clock a. m.

37 *Exhibit No. 3.—La Crosse and Milwaukee R. R. Co. to Francis A. Palmer—mortgage.*

This indenture, made the thirtieth day of June, in the year of our Lord one thousand eight hundred and fifty-four, between the La Crosse and Milwaukee Railroad Company, a corporation duly constituted by the laws of the State of Wisconsin, party of the first part, and Francis A. Palmer, of the city of New York, party of the second part, witnesseth: Whereas the said La Crosse and Milwaukee Railroad Company, in pursuance of their corporate powers, are now engaged in constructing a railroad from the city of Milwaukee, on Lake Michigan, to La Crosse, on the Mississippi River, in the State of Wisconsin, and for that purpose, in part, have resolved to raise a sum of money by loan, for the purpose of purchasing iron, rails, and machinery therefor, and of aiding in the construction of said railroad and putting the same into operation; and for the objects and purposes aforesaid, and in order to secure the payment and satisfaction of the moneys to be raised as aforesaid, it is proposed and intended by the said parties of the first part to execute, issue, and deliver five hundred bonds or writings, obligatory, each for the sum of one thousand dollars, to be numbered respectively from number one (1) to five hundred (500) inclusive, and nine hundred bonds, each for the sum of five hundred dollars, to be numbered respectively from number one (1) to nine hundred (900,) inclusive, which bonds are to be in the following form:

one [redacted] the rate of eight per centum per annum, semi-annually, on the first day of each November and of each May ensuing the date hereof, until the said principal sum shall be paid, on the presentation and delivery of the annexed warrants at said bank. This bond is one of a series of fourteen hundred bonds of the company aforesaid, of even date, to wit: 500 bonds for the sum of $1,000 each, numbered respectively from number 1 to number 500 inclusive, and 900 bonds for the sum of $500 each, numbered respectively from number 1 to number 900, inclusive, amounting in the aggregate to $950,000, secured by a mortgage executed in trust to Francis A. Palmer, of the city of New York, upon that part of the road of said company extending from its eastern termination, in the city of Milwaukee, to Portage City, being 95 miles in distance, together with the property and effects of said company on that part of the road. And said company further agree that this obligation, and all rights and benefits arising therefrom, may be transferred by general or special endorsement, or by delivery, as if the same was a note of hand payable to bearer.

The holder of this bond shall be entitled, at any time within ten years from the date hereof, to convert the principal sum into the stock of the said company, at par, on surrendering this bond, with the interest warrants then not due annexed.

In testimony whereof, the said company have hereunto caused to be affixed their corporate seal, and these presents to be subscribed by their president and secretary, at Milwaukee, the first day of July, 1854.

——— ———, *President.*

——— ———, *Secretary.*

39 I hereby certify that the La Crosse and Milwaukee Railroad Company have executed to me in trust the mortgage referred to in the foregoing bond, and that I have caused the same to be recorded in the several counties wherein said mortgaged premises are situated, and that the foregoing is one of the several bonds described in and secured by said mortgage.

——— ———, *Trustee.*

Now, therefore, this indenture witnesseth, that the said La Crosse and Milwaukee Railroad Company, in consideration of the premises, and in order to secure the payment of the said bonds [redacted]

herein
contained shall be so construed as to prevent the said parties of the first part from selling, hypothecating, or otherwise disposing of any city or county bonds or other securities received in payment of stock or otherwise, or of any lands or other property of said company not necessary to be retained for the roadway, depots, and stations now required for the construction or convenient use of that part of said road, nor from collecting moneys due said company on stock subscription or otherwise, nor shall anything herein contained be so construed as to prevent the said parties of the first part from collecting and appropriating towards the construction, use, and repair of the remaining parts of said road westward towards the Mississippi River, all stock subscriptions, donations or loans of money, lands or other property which may have been, or may hereafter be, made for that purpose, but said parties of the first part shall have full right so to proceed, without let or hindrance from said party of the second part. And the remaining portion of the said railroad which, by the said parties of the first part, may be so constructed, shall be held in use by the said parties of the first part, to their own benefit and behoof forever, so far as the claims of the said party of the second part, or his successor, might otherwise be construed as in conflict therewith, it being distinctly understood that the conveyance made by this indenture is only for so much of the present or hereafter to be acquired rights, interest, and property of the said company, parties of the first part, as are or shall be vested or belong or appertain to that part of said railroad extending from the city of Milwaukee to Portage City, aforesaid, and being in distance ninety-five miles. To have and to hold the said premises, and every part thereof, with the appurtenances, unto the said party of the second part, his successors in said trust, and assigns, upon the following trusts, that is to say: In case the said parties of the first part shall fail to pay the principal or any part thereof, or any of the interest of any of said bonds at any time when the same may become due and payable, according to the tenor thereof, when demanded, then after sixty days after such default, (in case such principal or interest shall then remain unpaid,) upon request of the holder of such bond, it shall and may be lawful for the said party of the second part, his successor in said trust, or assigns, at his or their discretion, to enter into and upon and take possession of all and singular the whole or any part of their property and effects, mortgaged as above

in fact or agent of the said

of the holders of at least one-half of the bonds then unpaid and unconverted into stock, shall, cause the said premises, property, and effects hereby mortgaged, or intended so to be, or so much thereof as shall be necessary to and discharge the principal and interest of all such of said bonds as may then be unpaid and unconverted as aforesaid, to be sold at public auction, in the city of Milwaukee, in the State of Wisconsin, aforesaid, or in the city of New York, giving at least forty days' notice of the time, place, and terms of such sale, and of the specific property to be sold, by publishing the same in two newspapers of good circulation in each of the cities aforesaid, and wherever else required by law, and execute to purchaser or purchasers thereof a good and sufficient deed of conveyance in fee simple of all said premises, and all such other instruments as may be necessary or proper for the property or effects so sold, which shall be a bar against the parties of the first part, their successors or assigns, and all persons claiming under them, of all right, interest, or claim in or to said premises, property, or effects, or any part thereof. And said trustees shall, after deducting from the proceeds of said sale the costs and expenses thereof and of managing such property, apply so much of the proceeds as may be necessary to the payment of said principal and interest due or unpaid on said bonds, and shall restore the residue thereof to the parties of the first part, it being hereby expressly understood that in no case shall any claim or advantage be taken of any valuation, appraisement, or extension laws by the said parties of the first part, nor any injunction or stay of proceedings, or any process be applied for or obtained by them to prevent such entry or sale as aforesaid. And the said parties of the first part hereby covenant, for the consideration aforesaid, to execute and deliver any further reasonable and necessary conveyance of the premises, property, or effects hereby mortgaged, or intended so to be, or any hereof, to the said party of the second part, his successor in said trust, and assigns,
for more fully carrying into effect the objects hereof, particularly for
42 the conveyance of any property or effects subsequently to the date
hereof acquired by said parties of the first part, and hereby intended
43 to be mortgaged as hereinbefore expressed. And the said parties of
the first part hereby further covenant, as aforesaid, that the money borrowed for the purposes aforesaid, upon the security of said bonds, shall be faithfully applied to the purchase and transportation of iron, rails, and machinery, for the construction and extension of said road, and the expense attending such loan and purchase, and that said rails and machinery so purchased shall be transported and used with due diligence in the construction, finishing, and furnishing of said railroad. And it is hereby mutually agreed, and these presents are upon this express condition, that on the payment of principal and interest of said bonds, at the times therein specified for the payment thereof, or the conversion thereof into stock in manner aforesaid, the estate hereby granted to the said party of the second part shall be void, and the right of the premises, property, and effects hereby conveyed or granted shall revert to and invest in the said parties of the first part, without any acknowledgment of satisfaction, reconveyance, re-entry, or other act. And it is also further mutually agreed that the said party of the second part, his successors in said trust, and assigns, shall only be accountable for reasonable diligence in the management thereof, and shall not be responsible for the acts of any agents employed by him or them, when such agent is
selected with reasonable discretion; and that said party of the second
44 part, his successor in said trust, or assigns, shall be entitled to receive
proper compensation for any labor or services performed by him in the discharge of his trust, in case he shall be compelled to take possession of said premises or any part thereof, or manage the same. And it is further mutually agreed that in case of the death, mental incapacity, or resignation

of the said party of the second part, all his estate, right and interest, power and control in the premises, property and effects, aforesaid, shall be divested, cease, and determine, and the same shall from thenceforth, for the purposes aforesaid, be vested in, and all and singular the trusts and duties hereinbefore mentioned and enumerated shall devolve, upon Isaac Seymour, of the city of New York, if he shall be living, without any further or other assurance or conveyance of or for the same; and in case of the mental incapacity, death, or resignation of the said Isaac Seymour, after the trust hereby created shall have devolved on him, the said parties of the first part shall, or in their default to take proceedings therefor for thirty days, the holders of a majority of said bonds may, apply to the supreme court of the State of Wisconsin to appoint a new trustee, being a resident of the city of New York, to supply his place; and thereupon such new trustee shall become
45 vested, for the purposes aforesaid, with all the rights and interest hereby conveyed to or vested in the said party of the second part, without any further assurance or conveyance for the same; but if the same be necessary, both or either of the parties hereto shall execute any necessary releases or conveyances for the purpose.

In witness whereof, the parties of the first part have caused their corporate seal to be hereto affixed, and these presents to be subscribed by the president, and the said party of the second part has set his hand and seal the day and year first above written.

STODDARD JUDD, *President.* [SEAL.]

Signed, sealed and delivered in presence of—
ROBERT E. GILLET, J. H. BURNELL.

FRANCIS A. PALMER. [SEAL.]

Sealed and delivered in presence of—
GEO. C. PETERS, LEWIS N. GLOVER.

STATE OF NEW YORK,
City and County of New York, ss:

I, Lewis N. Glover, residing in the said city of New York, duly appointed by the governor of the State of Wisconsin a commissioner for said State of Wisconsin in and for the State of New York, duly sworn and qualified to take testimony, acknowledgments, &c., to be used or recorded in the State of Wisconsin, do, by this instrument, given under my hand and official seal, certify that on this thirtieth day of June, A. D. eighteen hundred and fifty-four, before me personally appeared Francis A. Palmer, known to me to be the same person who executed the foregoing instrument, and the said Francis A. Palmer acknowledged the signing and sealing of the said instrument to be his voluntary act and deed.

In witness whereof, I have hereunto set my hand and official seal the day and year last above written.

LEWIS N. GLOVER, [SEAL.]
Commissioner for Wisconsin in New York.

STATE OF WISCONSIN,
City and County of Milwaukee, ss:

On this fifth day of July, A. D. 1854, before me, Robert E. Gillet, a notary public in and for said county of Milwaukee, and State of Wisconsin, personally came Stoddard Judd, the president of the La Crosse and Milwaukee Railroad Company, to me known, being by me duly sworn, did depose and say that he resides in the town of Fox Lake, county of Dodge, in the

46 aforesaid State of Wisconsin; that he is the president of the La Crosse and Milwaukee Railroad Company; that he knows the corporate seal of the said railroad company; that the seal affixed to the above and foregoing instruments in writing is such corporate seal; that it was so affixed by order of the board of directors of the said railroad company; and that he signed his name thereto by like order, as president of the said railroad company.

In witness whereof, I have hereto subscribed my name and affixed my notarial seal this fifth day of July, A. D 1854.

ROBERT E. GILLET, [SEAL.]
Notary Public, residing in the County of Milwaukee, State of Wisconsin.

Recorded July 5th, A. D. 1854, at 10 o'clock a. m.

47 *Exhibit No. 4.—La Crosse and Milwaukee Railroad Company to Francis A. Palmer, trustee, and United States Trust Company—collateral mortgage.*

This indenture, made this eighteenth day of February, A. D. one thousand eight hundred and fifty-six, by and between the La Crosse and Milwaukee Railroad Company, a corporation duly constituted as such by the laws of the State of Wisconsin, parties of the first part, and Francis A. Palmer, of the city, county, and State of New York, party of the second part. Whereas the parties of the first part have heretofore duly executed and delivered to the party of the second part their certain indenture of mortgage covering all the real and personal property and estate appertaining to the eastern line or section of their road, extending from the city of Milwaukee to Portage City, and being about ninety-five miles in length, which mortgage bears date on the thirtieth day of June, A. D. one thousand eight hundred and fifty-four, and has been duly recorded in the office of the register of deeds in the same counties through which said road runs, the same having been made to the party of the second part in trust, to secure the payment of the principal and interest of certain first mortgage eight per cent. coupon bonds of the said company of the denominations of one thousand dollars and five hundred dollars, bearing date the first day of July, A. D. one thousand eight hundred and fifty-four, and becoming due on the first day of November, A. D. one thousand eight hundred and seventy-four, respectively, with the interest thereon from date, at the rate of eight per cent. per annum, payable half yearly thereafter, which bonds amount in the aggregate to nine hundred and fifty thousand dollars, and which the said company, by virtue of the said mortgage, contemplated to issue and negotiate for the purpose of raising money from time to time, as the same might be wanted to aid in the construction of their said eastern line or section of road from the city of Milwaukee to Portage City, as by reference to the said mortgage or the record thereof will more fully and at large appear; and whereas the said company have heretofore issued and sold a portion of the said bonds thus secured, amounting to four hundred
48 and fifty thousand dollars, two hundred and forty of which are for the sum of one thousand dollars each, and numbered from number one to number sixty-four inclusive, number seventy to number ninety inclusive, number ninety-six to number one hundred and one inclusive, and number one hundred and fifty-one to number three hundred inclusive, and four hundred and twenty of which are for the sum of five hundred dollars each, and numbered from number one to number four hundred and twenty inclusive, and have built and equipped about sixty-one miles of the said eastern line or section of their road, leaving on hand and in their possession, unsold, the residue of said bonds authorized to be issued under the said mortgage, amounting

to five hundred thousand dollars, two hundred and sixty of which are for the sum of one thousand dollars each, and numbered from number sixty-five to number sixty-nine inclusive, from number ninety-one to number ninety-five inclusive, from number one hundred and one to number one hundred and fifty inclusive, and from number three hundred and one to number five hundred inclusive, and four hundred and eighty of which are for the sum of five hundred dollars each, and numbered from number four hundred and twenty-one to number nine hundred inclusive, and which the company contemplate to sell and negotiate for the purpose of raising means to aid in finishing the remainder of their said eastern section or line of road; and whereas, in order to render the said residue of bonds more valuable by giving additional security for their ultimate payment and redemption, the said company have, by a resolution by their board of directors, duly passed on the sixth day of February, A. D. one thousand eight hundred and fifty-six, authorized and directed the creation of a sinking fund for that purpose, in manner and form as hereinafter provided, by annually setting apart from the net earnings of the road, and depositing with the United States Trust Company of the city of New York, for the next nineteen years, the sum of twelve thousand dollars, which principal sum, together with all accumulations of interest, will form a capital sufficient to pay and satisfy the principal of the said residue of said mortgage bonds, two hundred and sixty of which are for the sum of one thousand dollars each, and numbered from number sixty-five to number sixty-nine inclusive, from number ninety-one to number ninety-five inclusive, from number one hundred and one to number one hundred and fifty inclusive, and from number three hundred and one to number five hundred inclusive, as aforesaid, and four hundred and eighty of which are for the sum of
49 five hundred dollars each, and numbered from number four hundred and twenty-one to number nine hundred inclusive, as aforesaid, on or before the maturity thereof:

Now, therefore, this indenture witnesseth, that the said parties of the first part, in addition to the several powers, covenants, liens, conditions, and agreements contained in the aforesaid indenture of mortgage heretofore executed and delivered as aforesaid, and as supplementary thereto, for the considerations aforesaid, and for and in consideration of one dollar to them in hand paid by the party of the second part, the receipt whereof is hereby acknowledged, have covenanted, promised, and agreed, and hereby do covenant, promise, and agree, to and with the said party of the second part, his successor and successors in the trust hereby created, and assigns, that for the further security and ultimate redemption of the said residue of the said mortgage bonds issued under the said mortgage, two hundred and sixty of which are for the sum of one thousand dollars each, and numbered from number sixty-five to number sixty-nine inclusive, from number ninety-one to number ninety-five inclusive, from number one hundred and one to number one hundred and fifty inclusive, and from number three hundred and one to number five hundred inclusive, and four hundred and eighty of which are for the sum of five hundred dollars each, and numbered from number four hundred and twenty-one to number nine hundred inclusive, and amounting in the aggregate to five hundred thousand dollars, they will annually, on or before the first day of November in each year thereafter, until the principal of the said residue of said mortgage bonds shall be fully paid, set apart and appropriate from the net earnings of the said road for the preceding twelve months, and deposit with the United States Trust Company, of New York, (an incorporated institution, located and doing business in the city of New York,) or its successor, which said United States Trust Company, or its successor, is hereby made, constituted, and appointed the trustee or receiver of the parties hereto, and of all the holders of the residue of the said mortgage bonds, amounting to

five hundred thousand dollars, and numbered as last aforesaid, issued by virtue of the aforesaid mortgage, as aforesaid, for the purposes hereinbefore mentioned, the just and full sum of twelve thousand dollars, which, together with the accumulations of interest thereon, will form a capital sufficient to pay and discharge the entire principal of the residue of said mortgage bonds,
amounting to five hundred thousand dollars, and numbered as last
50 aforesaid, issued by virtue of the last aforesaid mortgage, on or before the maturity of the said last-mentioned bonds; the first setting apart and appropriating of said sinking fund to be made and deposited on the first day of November, A. D. one thousand eight hundred and fifty-six; and the sinking fund, or several sums of money thus set apart and appropriated, with all accumulations of interest, shall, as soon as practicable thereafter, be laid out and invested by the said United States Trust Company or its successor, in the purchase of the residue of said mortgage bonds of the parties of the first part, before referred to and mentioned, two hundred and sixty of which are of the sum of one thousand dollars each, and numbered from number sixty-five to number sixty-nine inclusive, from number ninety-one to number ninety-five inclusive, from number one hundred and one to number one hundred and fifty inclusive, and from number three hundred and one to number five hundred inclusive, and four hundred and eighty of which are for the sum of five hundred dollars each, and numbered from number four hundred and twenty-one to nine hundred inclusive, issued under the aforesaid mortgage, whenever any or either of the said mortgage bonds can be purchased at or under par, and the accrued interest on the same, at the date of the purchase. In case the securities of the said company before specified cannot be procured or purchased on the terms aforesaid, then, and in that case, the United States Trust Company, or its successor, shall, from time to time, invest the said funds, under the advice and direction of the board of directors of the party of the first part, in such securities as shall be deemed most safe and profitable for the parties of the first part, provided, however, that the obligations of the parties of the first part to make such annual deposits to the said sinking fund, as aforesaid, shall cease and determine so soon as the funds and securities placed in the hands of the said United States Trust Company shall, with the accumulations of interest thereon, form a capital sufficient to pay and discharge, at the maturity thereof, all the outstanding unconverted bonds, numbered as last aforesaid, issued under the said mortgage. The said United States Trust Company, or its successors, shall at all times keep a proper and correct registry and account of the said several securities and sums to be held by them as aforesaid, and belonging to the said sinking fund, for the inspection and examination of the parties hereto, and of any of the stockholders or bondholders of the road, and shall
annually hereafter, during the continuance of the said trust, render to
51 the parties hereto a written statement, showing the true state and condition of the said sinking fund; and when any of the aforesaid securities of the parties of the first part shall have been purchased for the use of the sinking fund, the same shall, as soon as purchased, be cut, cancelled, and retained by the said United States Trust Company, or its successors, and be held and returned by them at the expiration of their trust.

The interest coupons on said purchased bonds are, however, to be regularly paid to the United States Trust Company, or its successor, by the parties of the first part, in the same manner as if held and owned by a third party for value; and in case of the resignation of the said Uunited States Trust Company as such trustee or receiver, or of its successor, or otherwise, the parties of the first part hereby reserve the right to supercede and revoke the aforesaid appointment of the said United States Trust Company, or its successor, and from time to time appoint and substitute as a new trustee or re-

ceiver, any other incorporated institution located and doing business in the said city of New York, and deemed by them fit and suitable for that purpose; and said new trustee or receiver, or the successor thereof, shall be vested with all the right, estate, powers, and privileges hereby conveyed to or vested in the United States Trust Company. And the said United States Trust Company, or its successor, shall, upon request, forthwith assign, transfer, and deliver to such substituted trustee or receiver, all the funds, property, and securities belonging to the said sinking fund so deposited with and held by them as aforesaid. The said United States Trust Company, or its successor, shall apply the funds and available securities in their hands to the payment and redemption of the said residue of the said mortgage bonds, two hundred and sixty of which are for the sum of one thousand dollars each, and numbered from number 65 to number 69 inclusive, from number 91 to number 95 inclusive, from number 101 to number 150 inclusive, and from number 301 to number 500 inclusive, and four hundred and eighty of which are for the sum of five hundred dollars each, and numbered from number 421 to number 900 inclusive, at their maturity rendering the overplus, if any, to the parties of the first part, or their assigns. And in case the parties of the first part shall fail, neglect, or refuse to set apart, appropriate, and deposit with the United States Trust Company, or its successor, the said several sums of money or any or either of them for the purposes of a sinking fund at the times and in the manner hereinbefore particularly set forth and provided,

52 then at the expiration of sixty days from and after such default, failure, neglect, or refusal, in case such payment and appropriation to the said sinking fund shall not have been made upon the request of the holder of any of the residue of such mortgage bonds, two hundred and sixty of which are for the sum of one thousand dollars each, and numbered from number sixty-five to number sixty-nine, inclusive, from No. 91 to No. 95 inclusive, from No. 101 to No. 150 inclusive, and from No. 301 to No. 500 inclusive, and four hundred and eighty of which are for the sum of five hundred dollars each, and numbered from No. 421 to No. 900 inclusive, or upon the request of the said United States Trust Company, or its successor, the said party of the second part, his successor or successors in the trust hereby created, or assigns, may enter into and upon, and take possession of, all or or any part of said premises, real and personal estate, and property, and as the attorney in fact or the agent of the said parties of the first part, by himself, or agents or substitutes duly constituted, have, use, and employ the same, making from time to time all needful repairs, alterations, and additions thereto, and after deducting the expenses of such use, repairs, alterations, and additions, apply the proceeds thereof to the payment of the principal and interest of the residue of the said bonds, numbered as last aforesaid, and issued under the said mortgage remaining unpaid. And the said party of the second part, his successor or successors in the trust hereby created, or assigns, on the written request of the holders of at least one-half of the said residue of the said mortgage bonds, numbered as last aforesaid, issued under the said mortgage then outstanding, unpaid, or unconverted into stock and not purchased and deposited for the sinking fund as aforesaid, shall cause the said premises, real and personal estate, and property, rights and franchises, or so much thereof as shall be necessary to pay and discharge the principal and interest of all the said residue of such mortgage bond numbered as last aforesaid as may be then unpaid and unconverted and not purchased and deposited as aforesaid, to be sold at public auction in the city of Milwaukee, in the State of Wisconsin aforesaid, or in the city of New York, giving at least ninety days' previous notice of the time, place, and terms of such sale, and of the real and personal property and estate, rights, and franchises to be sold, by publishing the same in two newspapers of good circu-

lation in each of the cities of Milwaukee and New York aforesaid, and wherever else required by law, and execute and deliver to the purchaser or purchasers thereof a good and sufficient deed of conveyance in fee simple for the same, which shall be a bar against the parties of the first part, their successors and assigns, and all persons claiming under them, of all right, interest, and claim of, in, or to said premises, real and personal estate, and property, right, and franchises, or any part thereof. The amount
53 of the bids or purchase-money on the said sale may be paid and satisfied, in whole or in part, by the residue of the said outstanding mortgage bonds, numbered as last aforesaid, or any of them, and the same shall be taken or received in whole or part payment and satisfaction by the party of the second part, his successor or successors in the trust hereby created, or assigns, according to their value, to be ascertained and determined by the net amount arising from said sale, together with the amount of unapplied cash assets belonging to the sinking fund, as compared to the amount of outstanding unconverted and unpurchased residue of said bonds, numbered as last aforesaid, issued under the said mortgage as aforesaid. And the said party of the second part shall, after deducting from the proceeds of said sale the cost and expenses thereof and of managing such property, apply so much of the proceeds as may be necessary to the payment of said principal and interest due and unpaid on the residue of the said outstanding mortgage bonds numbered as last aforesaid, issued under the said mortgage and not converted nor purchased for the sinking fund, nor used in payment of such bid as aforesaid, and shall pay over and restore the remainder of said proceeds to parties of the first part, their successors or assigns. It being hereby expressly understood that in no case shall any claim or advantage be taken of any valuation, appraisement, or extension laws by the said party of the first part, nor any injunction or stay of proceedings or any process be applied for or obtained by them to prevent such entry or sale as aforesaid. And the parties of the first part hereby covenant, for the considerations aforesaid, to execute and deliver any further reasonable or necessary conveyance or conveyances of the premises, or any part thereof, to the said party of the second part, his successor or successors in the trust hereby created, or assigns, for more fully carrying into effect the objects hereof, particularly for the conveyance of any rights, interests, or property subsequently to the date hereof acquired by said parties of the first part, and comprehended or intended to be in the description and terms of this instrument.

And the said parties of the first part hereby further covenant, as aforesaid, that the money borrowed for the purpose aforesaid, upon the security of the residue of the said mortgage bonds, numbered as last aforesaid, issued under the said mortgage, shall be faithfully applied for the purchase and transportation of iron rails and machinery, and for the construction and extension of said road, and the expenses attending such loan and
54 purchase, and that said rails and machinery so purchased, shall be transported and used with due diligence in the construction, finishing, and furnishing said railroad. And it is mutually agreed, and these presents are upon the express condition, that upon the payment of the principal and interest of the residue of the said mortgage bonds, numbered as last aforesaid, and issued under the said mortgage or on the conversion thereof into stock in manner aforesaid, the powers, rights, and estate hereby granted to the party of the second part, his successor or successors in the trust hereby created or assigned, shall be void; and when the principal and interest of all the residue of the said mortgage bonds issued under the said mortgage shall be fully paid and the residue of said bonds numbered as aforesaid duly cancelled, the said party of the second part, his successor or

successors in the trust hereby created, or assigns, shall, upon the request of the parties of the first part, or their assigns, duly execute and acknowledge the payment and satisfaction of this agreement, and shall deliver up the same to the parties of the first part or their assigns, to the end that the same may be duly and properly satisfied, cancelled, and discharged of record. And it is also further mutually agreed that the said party of the second part, his successor or successors in the trust hereby created, or assigns, it shall be accountable only for reasonable diligence in the management of the several trusts and matters herein and hereby committed to his and their care, control, and authority, and shall not be responsible for the act of any agent or attorney employed by him or them, when such agent or attorney is selected with reasonable discretion; and the said party of the second part, his successor or successors in the trust hereby created, shall be entitled to receive proper compensation for any labor or service performed by him or them in the discharge of his trust in case he or they shall be compelled to take possession of said premises and real and personal property and estate, or any part thereof, or to manage the same. And it is further mutually agreed, that in case of the death, mental or civil incapacity, or resignation of the party of the second part, all his estate, right, interest, power, and control of the premises shall be divested, cease, and determine, and the said parties of the first part shall, or in their default to take proceedings thereof for thirty days, the holders of a majority of the outstanding mortgage bonds issued under the said mortgage, may apply to the supreme court of the State of Wisconsin, to appoint in his place a new trustee, being resident of the city of New York; and thereupon, and upon his acceptance of the
55 trust, such new trustee shall become vested, for the purposes aforesaid, with all the rights, estate, property, and interest hereby conveyed to or vested in the said party of the second part, without any further assurance or conveyance of the same. But if the same shall be necessary, both or either of the parties hereto shall execute and deliver any other or further releases, agreements, or conveyances for that purpose, to the end that the true interest, object, and meaning of this instrument may be fully and faithfully carried into effect.

In witness whereof, the said parties of the first part, on the day and year first aforesaid, by order of the board of directors, have hereunto caused to be affixed their corporate seal, and these presents to be signed by their president and countersigned by their secretary, at Milwaukee, Wisconsin, and the said party of the second part has also hereunto set his hand and seal.

56 BYRON KILBOURN,.
President of the La Crosse and Milwaukee Railroad Co.
F. A. PALMER, *Trustee.* [SEAL.]

Attest:
[CORPORATE SEAL.] LEVI BURNELL, *Secretary.*

The words "numbered as last aforesaid," interlined between 11 and 12 lines of 5th page before execution.

In presence of—
NELSON MCNEIL.
CHAS. E. JENKINS.

Witnesses to signature of F. A. Palmer, trustee:
W. A. WOODWARD.
JOHN J. HILL.

STATE OF WISCONSIN, *Milwaukee County, ss:*

On this 18th day of January, 1856, came before me Byron Kilbourn,

president of La Crosse and Milwaukee Company, and Levi Burnell, secretary of said company, to me personally known, and severally acknowledged that they had executed the foregoing conveyance, written instrument, for the uses and purposes therein expressed.

CHAS. E. JENKINS,
County Judge, Milw. Co., Wis.

STATE OF WISCONSIN,
County court, Milwaukee County:

57 I, Matthew Keenan, clerk of said court, do hereby certify, that the Hon. Chas. E. Jenkins, whose name appears above, and before whom the foregoing acknowledgment was made, was at the date thereof, and now is, acting judge of the county court aforesaid, duly elected and qualified; and further, that I am well acquainted with the handwriting of said judge, and verily believe the signature purporting to be his is genuine.

In testimony whereof, I have hereunto set my hand and affixed [SEAL.] the seal of said court, this 18th day of February, A. D. 1856.

MATTHEW KEENAN, *Clerk.*

NEW YORK CITY, COUNTY, AND STATE, *ss:*

On this 29th February, 1856, before the undersigned, a commissioner in and for the said State, residing in the city of New York, appointed by the governor of the State of Wisconsin, under the laws of said State, with full power and authority to take the acknowledgment and proof of deeds, and to be used or recorded in said State of Wisconsin, appeared Francis A. Palmer, known to me to be the person named in the foregoing indenture, and acknowledged that he executed the same freely as his act and deed as trustee, for the uses and purposes therein mentioned.

Witness my hand and official seal.

[OFFICIAL SEAL.] W. A. WOODWARD,
Commissioner for Wisconsin in New York.

Recorded March 17th, 1856, at 8 o'clock a. m.

58 *Exhibit No. 5.—Land grant mortgage.*

Deed of trust, made this thirty-first day of December, in the year of our Lord one thousand eight hundred and fifty-six, (1856,) between the La Crosse and Milwaukee Railroad Company, a corporation created by the legislature of the State of Wisconsin, party of the first part, and Greene C. Bronson, James T. Soutter, and Shepherd Knapp, trustees, as after-mentioned, all of the city and State of New York, parties of the second part.

Whereas the Congress of the United States, by an act approved June 3, 1856, entitled "An act granting public lands to the State of Wisconsin to aid in the construction of railroads in said State," did enact as follows:

(Here follows said act.)

And whereas the said railroad company, after the passing of said last-mentioned act, and on the same day, duly accepted the same by a resolution adopted by the directors of said company, a copy of which, certified
59 by the secretary of said company, under its corporate seal, was on the same day deposited in the office of the secretary of state:

And whereas said railroad company, for the purpose of constructing its road from Madison, by way of Portage City, to St. Croix River or Lake, has determined to borrow a sum of money not exceeding ten millions of dollars, and to issue its bonds for the repayment of the moneys which may be bor-

rowed, with the interest thereon, nine thousand of which bonds (exclusive of the numbering and interest warrants or coupons) will be substantially in the following form: "United States of America, State of Wisconsin. The La Crosse and Milwaukee Railroad Company. Know all men by these presents that the La Crosse and Milwaukee Railroad Company acknowledge themselves to be indebted to the bearer hereof in the sum of one thousand dollars, lawful money of the United States, for money borrowed for the construction of their road from Madison to the St. Croix River or Lake, which sum they agree to pay to the bearer hereof, on the first day of February, in the year of our Lord 1877, at the Bank of the Republic, in the city of New York, with interest at the rate of seven per centum per annum, payable in the city of New York, semi-annually, on the first day of February and the first day of August in each year, on presentation and delivery of the interest warrants or coupons hereto annexed. Said railroad company reserves the right to satisfy and discharge this bond at any time before the principal becomes due, by paying to the holder thereof the sum of eleven hundred dollars, with the interest up to the time of such payment, so far as the same may not have been previously paid. This is one of nine thousand bonds, all of the same tenor, and numbered from 1 to 9,000 respectively, which, with two thousand bonds for the sum of five hundred dollars each, numbered from 1 to 2,000 respectively, make in the aggregate the sum of ten millions of dollars; to secure the payments of all which bonds a deed of trust has been executed by said railroad company to Greene C. Bronson, James T. Soutter, and Shepherd Knapp, conveying all such interest as said railroad company has acquired, or may hereafter acquire, in all the land granted to said railroad company by the act of the legislature of the State of Wisconsin, approved October 11, 1856, entitled "An act to grant certain lands to the La Crosse and Milwaukee Railroad Company, and to execute the trust created by an act of Congress entitled "An act granting certain lands to the
60 State of Wisconsin to aid in the construction of railroads in said State," approved June 3, 1856, so far as the lands granted by said act of the legislature are applicable to the construction of the road of said railroad company from Madison, by way of Portage City, to St. Croix River or Lake, estimated to be about one million of acres; and also conveying all such interest as said railroad company has acquired, or may hereafter acquire, in said road from Madison to St. Croix River or Lake, and in the road from Portage City to La Crosse, with all the equipments and other things pertaining to said roads. Reference to which trust deed, bearing date the —— day of December, 1856, and reciting the said acts of Congress and the legislature, is hereby had and made for a more full description of said lands, roads, and other property, and the interest thereby conveyed to said trustees.

"In witness whereof, said railroad company has hereto affixed its cor-
[L. s.] porate seal, with the names of its president and secretary, the first day of February, in the year of our Lord 1857.

——— ———, *President.*
——— ———, *Secretary.*

"Registered and countersigned by the trustees, this —— day of ——, 185 .

———, *Trustees.*"

And two thousand of which bonds will be in the like form, but for the sum of five hundred dollars each.

And whereas said railroad company has determined to secure the payments of such bonds as may be issued as aforesaid, in the manner herein provided:

Now, therefore, this deed witsesseth, that the said railroad company, in

can be procured for the same; and whenever there shall be any money so on deposit said trustees may, in their discretion, apply the same to the purchase of the bonds which may have been issued by the railroad company as aforesaid at their market value in the city of New York, provided such market value shall not exceed the par value thereof; and whenever the sum so on deposit shall exceed twenty-five thousand dollars the surplus beyond that sum shall be so applied by said trustees; and in case a sufficient amount of bonds to absorb such surplus cannot be obtained at par in the city of New York, such trustees shall, on the written request of said railroad company, make purchase of bonds at a premium not exceeding ten per centum, if the same can be had in the New York market.

Fifth. Whenever the trustees shall receive any of the bonds above mentioned in payment for lands sold, or on mortgages, or shall purchase any bonds, as above provided, the same, with any unpaid interest warrants or coupons annexed thereto, shall be immediately cancelled, and shall thereafter only be held as vouchers by said trustees.

Sixth. In case default for the space of sixty days shall be made in the payment of any of said interest warrants or coupons as they respectively fall due, it shall thereupon be lawful, and said trustees are hereby authorized and empowered, in their discretion, to sell, at public or private sale, for the best prices which can be obtained for the same, all or any portion of the lands mentioned in such schedule, for the purpose of obtaining the necessary

And furthermore, that upon the consideration aforesaid, the said railroad company has granted, bargained, sold, conveyed, and confirmed, and does by these presents grant, bargain, sell, convey, and confirm, unto said parties of the second part, all and singular the lands granted or intended to be granted to said railroad company, under or by virtue of the act of Congress and the act of the legislature of Wisconsin, hereinbefore mentioned, so far as the said lands pertain or are applicable to the construction of said roads from Madison, by way of Portage City, to the St. Croix River or Lake, estimated to be about one million of acres of land; together with all and singular the hereditaments and appurtenances belonging, or in anywise appertaining to the lands and real estate hereby conveyed or intended to be conveyed. And it is hereby declared to be the intention of the parties to these presents to convey to and vest in said parties of the second part, all the property, real and personal, of said railroad company to be acquired hereafter, as well as that which has already been acquired, together with all the rights, liberties, privileges, and franchises of said railroad company, in respect to the roads above mentioned, as fully and amply as the same might or could be conveyed if the said railroads had already been fully constructed
62 and equipped, and the particular lands granted by the foregoing acts of Congress and the legislature, so far as the same are applicable to the construction of said road from Madison to St. Croix River or Lake, had already been designated and conveyed to said railroad company. To have and to hold all and singular the property, real and personal, with the hereditaments and appurtenances, and all and singular the rights, liberties, privileges, and franchises hereby conveyed or intended to be conveyed to said parties of the second part, and the survivors and survivor, successors and successor of them, and their and his heirs and assigns, forever, as joint tenants, and not as tenants in common. In trust, nevertheless, and upon the trusts, terms, and conditions herein expressed:

First. Until default shall be made in the payment of said bonds, or some of them, or the interest thereon, said railroad company shall be suffered and permitted to possess, hold, and enjoy said roads from Madison to St Croix River or Lake, and from Portage City to La Crosse, with the equipments and all other things appertaining to said roads, and use the same, and take and receive the income and profits thereof, in the same manner as though this deed had not been made.

on the whole or any part of the property hereby conveyed or intended to be conveyed; and said trustees assume no duty or responsibility on those subjects, or in relation to any other matter, except as is herein provided.

Eighth. Said trustees may appoint all such attorneys, counsellors, clerks, and other agents, as they may deem proper, in the execution of the trust, and shall not be answerable for the defaults or other misconduct of such attorneys, counsellors, clerks, or other agents, unless chargeable with culpable negligence in their selection; and further, neither of the trustees
66 shall be answerable for the acts, omissions, or defaults of his associates or associate, nor shall either of the trustees be responsible for anything short of gross negligence or wilful defaults in the discharge of his duties.

Ninth. This trust extends to such bonds, and such only, as shall be registered and countersigned by said trustees; and when all of said bonds shall be satisfied and discharged, the trust shall cease. The trust shall also cease at the end of six calendar months after the principal moneys shall fall due, as to all such bonds as shall not then have been presented for payment; and whenever the trust shall determine, and any moneys which may be due to the trustees shall be paid, the trustees will reconvey to said railroad company all their rights, title, and interest of, in, and to all of said trust property, which may not have been previously disposed of in pursuance of the trust.

Tenth. All the powers and duties of the trustees may be executed and discharged by any two of them; and in case of the death, incapacity to serve, or resignation of any trustee, all the estate and interest hereby created shall vest in the other trustees or trustee, as fully as if they or he only had been named in and had executed the deed.

The supreme court in the first judicial district of the State of New York may remove either of the trustees, on the application of his associates, or of the railroad company, reasonable notice being first given to such trustees. Any trustee may resign his trust, and thenceforward be discharged from all further duty or obligation in relation to it, provided such resignation, after reasonable notice to the president or secretary of said railroad company and the other trustees, shall be approved by said supreme court. If at any time there shall be only one trustee capable of acting, said supreme court, on reasonable notice to such trustee and said president or secretary, may appoint a new trustee, who shall thereupon acquire and have all rights, titles, interest, and authority under the trust, and subject to all duties and responsibilities in relation to the same, as fully as though he had been originally named as a trustee and had executed this deed.

Eleventh. Said railroad company will, from time to time, pay all such costs, charges, and expenses as the trustees may sustain or be put to in the execution of the trust, and keep them fully indemnified in the premises.
67 Said trustees hereby accept and covenant, and agree to and with said railroad company, faithfully to execute said trust; and said railroad company hereby covenants and agrees to and with said trustees, the survivors and survivor, successors and successor of them, that said railroad company will from time to time, during the continuance of the trust, make, execute, cause to be duly recorded, and deliver to said trustees, or to the persons who shall then be trustees, all such further conveyances and assurances, and will do all such further acts, as may be either necessary or proper for more effectually vesting in said trustees all such rights, title, interest, or estates, both legal and equitable, as said railroad company now has, or may hereafter acquire, of, in, or to all and every part of the property hereby conveyed or intended to be conveyed.

In witness whereof, said railroad company has hereto affixed its corporate seal, and caused the same to be subscribed by its president and secretary;

[SEAL.] and the trustees have subscribed their names and affixed their seals the day and year first above written.

BYRON KILBOURN, *President,*
EDWIN H. GOODRICH, *Secretary,*
Of the Railroad Company.
GREENE C. BRONSON, [SEAL.]
JAMES T. SOUTTER, [SEAL.]
SHEPHERD KNAPP, [SEAL.]
Trustees.

E. MARINER,
S. H. ALDEN,
Witnesses as to Byron Kilbourn, president, and Edwin H. Goodrich Secretary.

J. S. ATWOOD,
JOHN BISSEL,
Witnesses as to Messrs. Soutter and Knapp.

Witnesses for Greene C. Bronson, as to the execution of the foregoing instrument by him:

EDWARD WADE.
S. H. ALDEN.

68 *Exhibit No. 6.—Mortgage to Bronson and Soutter—eastern division.*

Deed of trust, made this seventeenth day of August, in the year of our Lord eighteen hundred and fifty-seven, between the La Crosse and Milwaukee Railroad Company, a corporation created by the legislature of the State of Wisconsin, party of the first part, and Greene C. Bronson, and James T. Soutter, of the city and State of New York, trustees as hereinafter mentioned, parties of the second part.

Whereas said railroad company, for the purpose of constructing its roads, has determined to borrow a sum of money not exceeding one million of dollars, and to issue not exceeding one thousand of its bonds for the repayment of the sums which may be borrowed, with interest thereon, which bonds will be numbered respectively from one to one thousand, both inclusive, and will be substantially in the following form, to wit:

United States of America, State of Wisconsin.

No. —. $1,000.

Know all men by these presents that the La Crosse and Milwaukee
69 Railroad Company acknowledge themselves indebted to the bearer hereof in the sum of one thousand dollars, for money borrowed for the construction of their roads, which sum they agree to pay to the bearer hereof on the first day of September, in the year of our Lord 1870, at the Bank of the Republic in the city of New York, with interest at the rate of eight per cent. per annum, payable in the city of New York semi-annually, on the first day of March and the first day of September in each year, on presentation and delivery of the interest warrants or coupons hereto annexed. The holder of this bond may, at any time within five years from the date hereof, convert the same into the capital stock of the company, estimating both the bond and the stock at par, on surrendering the bond with the unpaid coupons.

This is one of one thousand bonds, all of the same tenor, and numbered from 1 to 1000 respectively, making in all one million of dollars, for securing the payment of which a trust deed has been executed by said company to Greene C. Bronson and James T. Soutter, of the city and State of New York, conveying to them (subject to certain charges thereon) the railroad of said company, commencing in the city of Milwaukee and running from thence to

Portage City, a distance of ninety-five miles, which road has been constructed and is now in full operation; and also conveying to them the railroad of said company (as well that part which has been constructed as that part which remains to be constructed) from Watertown, by the way of Columbus, to Midland, (where it connects with the main line of the railroad of said company,) a distance of forty miles, one-half of which last-mentioned road, being the part between Watertown and Columbus, has been constructed, and is now in full operation; together with the equipments and all other things pertaining or which may hereafter pertain to the roads so conveyed, or either of them, reference to which deed is hereby had and made for a more full description of its contents.

In witness whereof, said railroad company has hereto affixed its [SEAL.] corporate seal, and caused the same to be signed by its president and secretary, this first day of September, in the year of our Lord 1857.

——— ———, *President.*

——— ———, *Secretary.*

Registered and countersigned this —— day of ——, 185 .

——— ———, *Trustees.*

And whereas said railroad company has determined to secure the
70 payment of said bonds, with the interest thereon in the, manner herein provided:

Now, therefore, this deed witnesseth, that said railroad company, in consideration of the premises and the sum of one dollar paid by said parties of the second part, has granted, bargained, sold, conveyed, and confirmed, and does by these presents, grant, bargain, sell, convey, and confirm, unto said parties of the second part all and singular the railroad of said company, commencing in the city of Milwaukee and running from thence to Portage City, a distance of ninety-five miles, which road has been constructed and is now in full operation, and also the railroad of said company (as well that part which has been constructed, as that part which remains to be constructed) from Watertown, by way of Columbus, to Midland, (where it connects with the main line of the railroad of said company,) a distance of forty miles, one-half of which last-mentioned road, being the part between Watertown and Columbus, has been constructed and is now in full operation including all and singular the several tracts, pieces, or parcels of land which now are, or may hereafter be or constitute the site of the roadways, turnouts, engine-houses, workshops, depots, and other buildings, and all the other lands and real estate which now constitute or may hereafter constitute or be part of or appertain to said railroads, or either of them; and also all and singular the superstructure of said railroads, whether now made or to be made hereafter, and all the engine-houses, workshops, depots, and other buildings, and all the other improvements on or appertaining to said railroads, or either of them, whether now built or made or to be built and made hereafter; and also all and singular the locomotive engines, and other rolling stock, and all the other equipments of every kind and description, which have already been or may hereafter be procured for or used on said railroads, or either of them; and all the materials, tools, implements, and utensils, and other personal property, which have been or may hereafter be procured for or used in connection with said railroads, or either of them; and also all and singular the rights, liberties, privileges, and franchises of said railroad company, so far as they relate to said railroads from Milwaukee to Portage City, and from Watertown, by the way of Columbus, to Midland aforesaid. And it is hereby declared to be the intention of the parties to these presents to convey to and vest in said parties of the second part
71 all the property real and personal, of said railroad company, to be

acquired hereafter, as well as that which has already been acquired, together with all the rights, liberties, privileges, and franchises of said railroad company, in respect to said railroad from Milwaukee to Portage City, and from Watertown, by the way of Columbus, to Midland, as fully and amply as the same might be conveyed if said railroads had already been fully constructed and equipped.

Said railroad from Milwaukee to Portage City is subject to a first mortgage on the same of ten thousand dollars per mile, amounting in the aggregate to nine hundred and fifty thousand dollars; the first eighteen miles of said road from Milwaukee westward is subject to a second mortgage of one hundred and fourteen thousand dollars; and the next forty miles of said road westward of the eighteen miles, is subject to a second mortgage of two hundred thousand dollars.

To have and to hold all and singular the property, real and personal, with the hereditaments and appurtenances, and all and singular the rights, liberties, privileges, and franchises hereby conveyed or intended to be conveyed, subject to the aforesaid mortgages, to the said parties of the second part, and the survivor and successor of them, and their and his heirs and assigns forever, as joint tenants and not as tenants in common; in trust nevertheless, and upon the trusts, terms, and conditions herein expressed.

First. Until default shall be made in the payment of said bonds, or some of them, or the interest thereon, said railroad company shall be suffered and permitted to hold and enjoy said railroads, with the equipments and all other things appertaining to the same, and to use the same, and to take and receive the income and profits thereof, to its own use, in the same manner as though this deed had not been made.

Second. In case default for the space of sixty days shall be made in the payment of any of said interest warrants or coupons, as they respectively fall due, or if default for the like period shall be made in the payment at maturity of the principal sum of money mentioned in any of the said bonds, then and in either of said cases it shall be lawful, and said trustees are hereby authorized in their discretion, either in person or by their attorney or attorneys, agent or agents, to enter into and upon, and take possession of, all and singular the railroads and all the other property, real and personal, hereinbefore conveyed or intended to be conveyed, and to take and
72 receive the income and profits thereof, and to sell all and singular said railroads and other property, with all the rights, liberties, privileges, and franchises of said railroad company, in respect to said railroads from Milwaukee to Portage City, and from Watertown, by the way of Columbus, to Midland, either at public or private sale, and to execute and deliver to the purchaser or purchasers deeds and conveyances, which shall vest in such purchaser or purchasers all the estate, right, title, and interest, whether legal or equitable, of said trustees and said railroad company of, in, or to said property, rights, liberties, privileges, and franchises, and every part and parcel thereof. But before any sale shall be made at auction, notice of such intended sale shall be published, once in each week, for twelve weeks at the least, in two newspapers published in the city of New York, and in a newspaper published in the city of Milwaukee; and should any further notice be required by the laws of the State of Wisconsin, the same shall be given. And in case the interest in default shall at any time be equal to the amount of the interest for one year on all the bonds then outstanding, or in case default shall be made in the principal sum of money mentioned in said bonds, or any of them, at maturity, then and in either of said cases said trustees, on the written request of the holder or holders of the major part in amount of the bonds then outstanding, shall proceed to make such sales and conveyances as are above mentioned.

Third. Said railroad company covenants and agrees to and with said trus-

tees, and the survivor and successor of them, that said company will, from time to time, during the continuance of the trust, make, execute, cause to be duly recorded, and deliver to said trustees all such further conveyances and assurances, and will do all such further acts and things, as may either be necessary or proper for more effectually vesting in said trustees all such rights, title, interest, or estate, both legal and equitable, as said railroad company now has or may hereafter acquire of, in, or to all and every part of the property hereby conveyed or intended to be conveyed, together with the rights, liberties, privileges, and franchises aforesaid.

Fourth. Said railroad company will cause this deed to be duly recorded in all proper places, and will do whatever else may be necessary or proper to give full effect to the conveyance, and will pay and discharge all taxes, charges, liens, and other burdens which either exist or may hereafter arise, or be imposed upon the property hereby conveyed or intended to be
73 conveyed; and the trustees assume no duty or responsibility on those subjects, or any of them, nor in relation to any other matter or thing, except as is herein provided.

Fifth. This trust extends only to such bonds as shall be registered and countersigned by the trustees; and when all of said bonds shall be satisfied and discharged, the trust shall cease. The trust shall also cease at the end of six calendar months after the principal moneys shall fall due, as to all such bonds as shall not then have been presented for payment; and whenever the trust shall determine, and any money which may be due to the trustees shall be paid, the trustees will reconvey to said railroad company all their right, title, and interest of, in, and to the trust property.

Sixth. Said railroad company will, from time to time, pay all costs, charges, expenses, and compensation of the trustees in, about, or for the execution of the trust, and will in all things keep them fully indemnified and saved harmless of, from, and against all damages, costs, charges, and expenses which they may sustain or be put to in consequence of accepting the trust, or of anything which may be done or omitted under it, saving only such damages as may arise from the culpable act or neglect of the trustees.

Seventh. The trustees are hereby authorized to appoint all such attorneys, counsellors, clerks, and other agents as they may deem proper in the execution of the trust, and shall not be answerable for the defaults or other misconduct of such attorneys, counsellors, or other agents, unless chargeable with culpable negligence in their selection; nor shall the trustees be responsible for anything short of gross negligence or wilful default in the discharge of any of their duties; nor shall either of the trustees be answerable for the acts, omissions, or defaults of his associate.

Eighth. All moneys which may be received by the trustees under the trust, after deducting therefrom all costs, counsel fees, charges, and other expenses of the trustees, and their compensation for executing the trust, shall be applied to the payment of the bonds which may be issued under the trust; and the surplus, if any, shall be paid to said railroad company.

Ninth. The supreme court in the first judicial district of the State of New York may remove either of the trustees on the application of his associate, or of the railroad company, reasonable notice being first given to said trustee. Either of the trustees may resign his trust, and be thenceforward discharged from all further duty or obligation in relation to it, provi-
74 ded such resignation, after reasonable notice to the president or secretary of said railroad company and the other trustee, shall be approved by said supreme court. And on the death, removal, or resignation of a trustee, said supreme court, on reasonable notice to the other trustee and said president or secretary, may appoint a new trustee, who shall thereupon acquire and have all right, title, interest, and authority under the trust, and

be subject to all duties and responsibilities under the same as fully as though he had been the original trustee and had executed this deed.

Tenth. Said trustees hereby accept and covenant, and agree to and with said railroad company, faithfully to execute said railroad trust.

In witness whereof, said railroad company has hereto affixed its corporate seal, and caused the same to be subscribed by its president and secretary, and the trustees have subscribed their names and affixed their seals, the day and year first above written.

BYRON KILBOURN, *President.*
JACKSON HADLEY,
Secretary of the Railroad Company.

[L. S.] GREENE C. BRONSON
[L. S.] JAS. T. SOUTTER.

Witness to the execution by Byron Kilbourn and Jackson Hadley—
WM. C. FORD.
H. L. RICHARDS.

Witness to the execution by Greene C. Bronson and James T. Soutter—
R. H. LOWRY.
H. W. FORD.

Copy of acknowledgment.

STATE OF NEW YORK,
City and County of New York, ss:

Be it remembered, that on this seventeenth day of August, one thousand eight hundred and fifty-seven, before me, the undersigned, Wm. Cleveland Ford, a commissioner, resident in the city of New York, duly commissioned and qualified by the executive authority and under the laws of the
75 State of Wisconsin, to take the acknowledgment of deeds, &c., to be used or recorded therein, personally appeared Byron Kilbourn,
[SEAL.] Jackson Hadley, Greene C. Bronson, and James T. Soutter, to me known to be the persons who executed the foregoing deed, and acknowledged the execution thereof, by them sealed and subscribed, to be their free act and deed for the uses and purposes therein mentioned.

In witness whereof, I have set my hand and affixed my official seal the day and year aforesaid.

WM. CLEVELAND FORD,
Commissioner for Wisconsin, in New York.

76 *Exhibit No. 7.—Western division foreclosure bill.*

District court of the United States, district of Wisconsin.

GREENE C. BRONSON, JAMES T. SOUTTER, AND SHEPHERD KNAPP, trustees, &c.,
against
LA CROSSE & MILWAUKEE RAILROAD COMPANY, J. Albert Helfenstein, trustee, Selah Chamberlain, Newcomb Cleveland, Edwin Townsend, Franklin J. Blair, Edmund R. Persons, Leman Graham, Daniel D. Scott, Avery Hill, A. V. Rudd, E. Bradford Greenleaf, John H. Tesch, Dewitt C. Freeman, Ephraim Mariner, Thomas Turton, John Sercomb, Sebastian Knetzger, Frederick Lind, Edward H. Brodhead, Joshua Hathaway, William Gemmell, Charles Quentin, August Sauthof, Sebre Howard, Lawrence G. Graham, Donald G. Scott, The Milwaukee and Minnesota Railroad Company, Moses M. Davis.

77 To the judges of the circuit court of the United States for the district of Wisconsin:

Greene C. Bronson, James T. Soutter, and Shepherd Knapp, trustees, as

hereinafter mentioned, all of whom are residents of the city of New York and citizens of the State of New York, bring this their bill against the La Crosse and Milwaukee Railroad Company, a corporation duly established under the laws of the State of Wisconsin, J. Albert Helfenstein, trustee, Edwin Townsend, Franklin J. Blair, Edmund R. Persons, Leman Graham, Daniel D. Scott, Avery Hill, A. V. Rudd, E. Bradford Greenleaf, John H. Tesch, Dewitt C. Freeman, Ephraim Mariner, Thomas Turten, John Sercomb, Sebastian Knetzger, Frederick Lind, Edward H. Broadhead, Charles Quentin, August Sauthof, Sebre Howard, Lawrence G. Graham, Donald G. Scott, the Milwaukee and Minnesota Railroad Company, Moses M. Davis, all whom are residents and citizens of said State of Wisconsin; and Selah Chamberlain, who is a citizen and resident of the State of Ohio; Newcomb Cleveland, who is a citizen and resident of the State of Illinois; Joshua Hathaway, who is a citizen and resident of the State of Georgia; and William Gemmell, who is an alien, and a resident of Scotland, in the kingdom of Great Britain, and a subject of the Queen of Great Britain. And thereupon your orators complain and say that the several actions and doings hereinafter stated and set forth, so far as they purport to be the acts or doings of your orators, are true of their own knowledge; and as to all the other matters and things hereinafter stated and set forth, your orators are informed and verily believe that the same are true.

78 Under and in pursuance of an act of the legislature of the State of Wisconsin entitled "An act to incorporate the La Crosse and Milwaukee Railroad Company," approved April 2, 1852, the La Crosse and Milwaukee Railroad Company became and was a body politic and corporate by that name and style, with all such powers, rights, privileges, franchises, and immunities as are mentioned in said act, and particularly with the power, right, privilege, and franchise of constructing and using a railroad in said State of Wisconsin, from La Crosse, in the county of La Crosse, to some point in the city of Milwaukee, a distance of about two hundred miles; which said company has ever since had and still has its office and principal place of business in said city of Milwaukee, and as your orators are advised and believe said corporation is a citizen of the State of Wisconsin, within the meaning of the constitution and laws of the United States relating to the jurisdiction of the federal courts.

By several other acts of said legislature relating to said company, and by acts concerning or relating to railroad companies in general in said State of Wisconsin, all passed subsequently to said act of incorporation, and before the making of the trust deed hereinafter mentioned, said company became entitled to the additional powers, rights, privileges, franchises, and immunities mentioned in said several acts. To all of which said acts or statutes, including the original act of incorporation, and also to an act of the Congress of the United States entitled "An act granting public lands to the State of Wisconsin to aid in the construction of railroads in said State," approved June 3, 1856, and being chapter 43 of the Laws of 1856, your orators hereby refer, and pray that the same may be taken and received as part of this bill of complaint as fully as if the same were herein recited and set forth at large.

Among the acts to which reference is above made, your orators particularly refer to said act of Congress, by which, among other things, certain lands were granted to the State of Wisconsin for the purpose of aiding in the construction of a railroad from Madison or Columbus, by way of Portage City, to the St. Croix River or Lake, and from thence to the west end of Lake Superior, and to Bayfield; and to the act of the legislature of Wisconsin approved October 11, 1856, by which said company was authorized and empowered, among other things, to construct and operate a railroad

from Madison, in the county of Dane, and from the village of Colum-
79 bus, in the county of Columbia, by the way of Portage City, to St. Croix River or Lake, and from thence to the west end of Lake Superior, and to Bayfield; and by which act all the lands which had been granted to said State of Wisconsin, by the government of the United States to aid in the construction of the railroad in question, were, upon certain terms and conditions therein mentioned, granted to said La Crosse and Milwaukee Railroad Company, which said act was accepted and agreed to by said company within five days after the passing of the same, to wit, on the 11th day of October, 1856, by a resolution adopted by the directors of said company, and a copy of which resolution, duly certified by the secretary of said company, under its corporate or common seal, was within said five days, and on the day last mentioned, deposited in the office of the secretary of state of said State of Wisconsin.

Soon after the passing of the original act of incorporation, said company was organized and commenced the construction of the railroad therein mentioned, from La Crosse to Milwaukee, and continued said work until the making of the trust deed hereinafter mentioned, at which time said company had completed and put in operation a portion of the road, from a point in the city of Milwaukee to Portage City, or near that place, a distance of about ninety-five miles.

On or about the thirtieth day of December, in the year of our Lord 1856, the board of directors of said company adopted resolutions to make the trust deed to your orators, and to issue bonds as hereinafter mentioned. A true copy of which said resolution (with the exception of that part of the second resolution which follows the words "Now, therefore, this deed witnesseth," which part is in same words with the corresponding part of said trust deed, and including all the remaining part of said deed down to the words, "In witness whereof,") is hereunto annexed, and marked Schedule A, and which resolutions your orators pray may be taken and received as a part of this their bill of complaint.

Afterwards, and on about the thirty-first day of December, in the year of our Lord 1856, said La Crosse and Milwaukee Railroad Company made its certain trust deed of that date, in the nature of a mortgage, between said company as party of the first part and your orators as parties of the second part; which deed was duly sealed with the corporate or common seal
80 of said company, and subscribed by the president and secretary of said company, and was also subscribed by your orators, and delivered said deed to your orators, by which said deed said company, after reciting at large said acts of Congress, and said act of the legislature of Wisconsin of the 11th of October, 1856, and after also reciting the determination of the company to borrow a sum of money not exceeding ten million of dollars, and to issue the bonds of the company for the repayment of the said money, the form of which bonds was recited and set forth at large in said deed; and after also reciting the determination of the company to secure the payment of the bonds in the manner therein provided, did, for the purpose of securing the payment of said bond and the interest warrants or coupons thereto annexed, and upon the trusts in said deed mentioned and contained, grant, bargain, sell, convey, and confirm to your orators all and singular the several tracts, pieces, or parcels of land which then were or might thereafter be or constitute the site of the railway, turn-outs, engine-houses, workshops, depots, and other buildings, and all the lands and real estate which then constituted or might thereafter constitute or be a part of the roads of said railroad company, from Madison, by way of Portage City, to the St. Croix River or Lake, and from Portage City to La Crosse, and all the other property, real and personal, mentioned in said deed, and

also all the rights, liberties, privileges, and franchises of said company relating to said roads, and all the lands granted or intended to be granted to said company, under or by virtue of said act of Congress and said act of the legislature, so far as said lands pertained or were applicable to the construction of said road from Madison, by way of Portage City, to St. Croix River or Lake. To have and to hold the same to your orators, and the survivors and survivor, successors and successor, of them, and their and his heirs and assigns forever, as joint tenants and not as tenants in common. In trust, nevertheless, and upon the trusts, terms, and conditions in said deed expressed, as by said in part recited deed, now in possession of your orators, and ready to be produced as the court shall direct, will more fully and at large appear; a true copy of which said deed, with the exception of said act of Congress and said act of the legislature of the State of Wisconsin, of the 11th of October, 1856, which are therein recited at large, is hereunto annexed, and marked Schedule B, and which copy your orators pray may be taken and received as a part of this their bill of complaint; which
81 said trust deed, after having been duly acknowledged by all the parties thereto, was duly recorded in the office of the secretary of state of said State of Wisconsin, on the thirteenth day of January, in the year of our Lord 1857, in the Book of Railroad Mortgages, pages 92 to 108, inclusive, reference to which said record is also hereby had and made.

Afterwards, on or about the first day of February, in the year of our Lord 1857, said La Crosse and Milwaukee Railroad Company made its several negotiable bonds of that date in the form mentioned in said trust deed, and sealed the same with the corporate or common seal of said company, and caused the names of its president and secretary to be thereto affixed, each of which bonds was for the payment of the principal sum of money therein mentioned, to the bearer of said bonds, on the first day of February, in the year of our Lord 1877, with interest at the rate of seven per centum per annum, payable in the city of New York, on the first day of February and the first day of August, in each year, on the presentation and delivery of the interest warrants or coupons to said bonds annexed, interest warrants or coupons, for the payment of said interest at the times above mentioned, were annexed to each of said bonds, and all of which bonds were severally for the payment of the principal sum of one thousand dollars, except one hundred bonds, which were severally for the payment of the principal sum of five hundred dollars. Parcels of said bonds were from time to time registered and countersigned by your orators; and the schedule hereunto annexed, and marked C, shows the several times when such registry and countersigning were made, with the numbers and denomination of the bonds so registered and countersigned on each occasion, which schedule your orators pray may be taken and received as a part of this their bill of complaint.

Afterwards, and about the several times when said bonds were so registered and countersigned by your orators, said company sold, issued, and delivered said bonds to a great number of individuals, partnership firms, and corporate bodies, who thereupon and thereby became the bearers and holders of said bonds, and entitled to the moneys therein mentioned and agreed to be paid. And the bonds so made, registered, and countersigned, and so sold, issued, and delivered, amounted in the aggregate to four millions of dollars of principal money, and no more; and have (or most of
82 them) come, by transfer, into the hands of a large number of persons, some of whom are unknown to your orators, and are too numerous to be made parties to this action.

After two thousand five hundred of said bonds of one thousand dollars each, amounting to two and a half million of dollars, had been so sold, is-

sued, and delivered, and on or about the twenty-eighth day of January, in the year of our Lord 1858, said La Crosse and Milwaukee Railroad Company, in pursuance of its covenant in said trust deed, for further assurance, and for the purpose of better and more effectually securing the payment of the bonds which had already been issued, and such bonds as should thereafter be issued, to the amount, in all, of four millions of dollars, made its certain indenture or deed of that date, sealed with the corporate or common seal of said company, and subscribed by its president and secretary, and delivered said indenture or deed to your orators; and thereby said company did grant, covenant, and agree to and with your orators as is stated and contained in said indenture or deed; a true copy of which said indenture or deed is hereunto annexed, and marked Schedule D, to which your orators refer, and pray that the same may be received and taken as a part of this their bill of complaint; which said indenture or deed, after having been duly acknowledged, was duly recorded in the office of the secretary of state of the State of Wisconsin, in the Book of Railroad Mortgages, on page 321 to 326, both inclusive, on the 11th day of February, 1858; to which record your orators also refer for the contents of said indenture.

Soon after the making of said trust deed, and in January, 1857, said company commenced the construction of that part of said road from La Crosse to Milwaukee which lies or is situate between La Crosse and Portage City, and completed the same from Portage City to La Crosse, a distance of about one hundred and four or five miles, in the month of October, 1858. A part of the road so constructed, to wit, that part which lies or is situate between Portage City and Tomah, otherwise called The Junction, a distance of about sixty-one miles, is also part and parcel of said road from Madison, by way of Portage City, to the St. Croix River or Lake, to aid in the construction of which lands were granted to the State of Wisconsin, and to said company as hereinafter mentioned. But neither said company nor your orators has or have obtained any deed or other evidence of title to any portion of said lands, or anything further than
83 may be found in the act of Congress and the act of the legislature of Wisconsin of the 11th of October, 1855, hereinbefore mentioned. The governor of said State of Wisconsin has refused, and still refuses, to give the certificate required by said act to the Secretary of the Interior, and wholly denies that either said railroad company or your orators are entitled to any lands by reason or on account of having constructed said road from Portage City to Tomah, as hereinbefore mentioned.

About the first of October, in the year 1857, one Selah Chamberlain, who, for several years last past, has resided, most of the time, in the State of Wisconsin, and who, if not a citizen of that State, is a citizen of the State of Ohio, under some agreement or arrangement between himself and said railroad company, made subsequently to the right, title, and lien of your orators, and in terms subject and subordinate to the right, title, and lien of your orators, entered into the possession, use, and enjoyment of all that portion of the railroad of said company which had been completed, which portion extended from the city of Milwaukee westward, to and beyond Portage City, and from time to time, as sections of the road further west were completed, entered into the possession, use, and enjoyment of the same; and ever since said railroad was completed to La Crosse, as above mentioned, has been, and still is, in the exclusive possession, use, and enjoyment of the entire road from Milwaukee to La Crosse, with all things appertaining to the same. And said Chamberlain, during all the time aforesaid, has taken and received to his own private use and benefit, and still does take and receive to his own private use and benefit, all and singular the rents, issues, profits, and income of said railroad, with its equipments and appurtenances.

On the first day of August, in the year 1858, said railroad company utterly failed, and made default in the payment of the half year's interest which then became due and payable on said bonds, and wholly neglected and refused to pay the interest warrants or coupons which became due and payable on that day; which said default in payment has ever since continued, and no part of the interest which should have been paid on said first day of August has ever been paid by said company. A small number (about forty or fifty of the interest warrants or coupons) which became due on said first day of August, were, within a few months afterwards, surrendered or delivered by bondholders to some officer of the company, on some security or engagement by the company to pay the amount in future; but such pay-
84 ment has not been made, nor have said interest warrants or coupons ever been cancelled or destroyed.

On the first day of February, in the year 1859, and again on the first day of August, in that year, said company utterly failed, and made default in the payment of the interest, interest warrants or coupons, which became due and payable on those days, respectively, and said company never has paid the whole or any part of the moneys which, according to the tenor and effect of said bonds, should have been paid on those days; and ever since said first day of August, 1859, the amount of interest in arrear and unpaid on said bonds has exceeded the sum of four hundred thousand dollars.

Said company has not acquired title to all the lands which constitute the site of the road from Portage City to La Crosse, nor to all the lands used for depot, engine, station, and other buildings pertaining to said road. The road was not constructed in a substantial or enduring manner, and is continually suffering deterioration from time and use; and said road, with its appurtenances, is not, in the judgment of your orators, worth more than the sum of one million of dollars. And should your orators obtain said lands granted by Congress and the legislature of Wisconsin, so far as the same are or may be applicable to said road between Portage City and Tomah, as above mentioned, it would not add more than half a million of dollars to the security of the bondholders, the lands in question being of poor soil and quality, and of little value as compared with other lands in the same State. Said railroad company now is, and for a long time past has been, utterly insolvent, and wholly destitute of property; said Chamberlain is also in insolvent circumstances; and, in any event, the bondholders will lose more than half, and probably fully three-fourths, of the moneys due to them from said company as such bondholders; and the longer the bondholders are delayed in obtaining possession of said road from Portage City to La Crosse, and getting into the receipt of the income and profits of the same, the greater their loss will be.

On or about the twenty-third day of August, 1859, your orators, by their attorney and agent, demanded of said Selah Chamberlain the possession and enjoyment of said railroad from Portage City to La Crosse, with all things appertaining to the same; but said Chamberlain utterly refused,
85 and ever since has neglected and refused to surrender the possession of said road, or its equipment or appurtenances, to your orators, and still continues to use and enjoy said road, with its appurtenances, and to take and receive the income and profits of the same to his own private use and benefit.

J. Albert Helfenstein, trustee, Selah Chamberlain, Newcomb Cleveland, Edwin Townsend, Franklin J. Blair, Edmund R. Persons, Leman Graham, Daniel D. Scott, Avery Hill, A. V. Rudd, E. Bradford Greenleaf, John H. Tesch, Dewitt C. Freeman, Ephraim Mariner, Thomas Turton, John Sercomb, Sebastian Knetzger, Frederick Lind, Edward H. Broadhead, Joshua Hatha-

way, William Gemmell, Charles Quentin, August Sauthof, Sebre Howard, Lawrence G. Graham, Donald G. Scott, the Milwaukee and Minnesota Railroad Company, Moses M. Davis, have or claim to have some interest in or lien upon the said mortgaged premises, or some part thereof; which interest or lien, if any, has accrued subsequently to the lien of said mortgage to your orators.

No proceedings at law have been had, nor any suit or action commenced by or on behalf of your orators, or any holder of any of the bonds of said company, secured by the mortgage aforesaid, or any or either of them, or any interest unpaid or accrued thereon, except only this action.

In tender consideration whereof, and forasmuch as your orators are remediless in the premises at and by the strict rules of the common law, and are only relievable in a court of equity, where matters of this kind are properly cognizable and relievable, your orators therefore pray the aid of this honorable court, and that the La Crosse and Milwaukee Railroad Company may be decreed to pay to your orators said principal sum of money above mentioned, with the arrears of interest now due, or hereafter to become due and payable thereon, together with the costs and charges in this behalf expended; and in default thereof, that said defendants above named, and all persons claiming and to claim under them, or either of them, or otherwise, may be forever barred and foreclosed of and from all equity of redemption and claim of, in, and to said mortgaged premises, and every part thereof; and may deliver over unto your orators all deeds, demises, and writings relating to or concern-
86 ing the same; and that all and singular said mortgaged premises, with the appurtenances, property, and effects in said mortgage described, may be sold under the decree of this court, and that out of the money arising from the sale thereof your orators may be paid the principal sum due on said bonds of the said the La Crosse and Milwaukee Railroad Company, and all interest money due and to become due thereon, together with their commissions or compensation, and all costs and charges by them in this behalf sustained, or that they may have such other or further relief in the premises as may seem proper and shall be agreeable to equity and good conscience.

And that an account may be taken of the bonds secured by the said mortgage to your orators, and of the amount due on those bonds for principal and interest, or either, and that the names of the lawful holders thereof may be ascertained.

That your orators, as trustees as aforesaid, may be let into the possession of the said railroad from La Crosse to Portage City, and the incomes, tolls, and profits of the same; and also all the depots, machine-shops, station-houses, and other real estate, equipment, and appurtenances connected with that part of the railroad of said last-mentioned company which lies between Portage City and La Crosse, at the date of said first-mentioned mortgage, or at any time since, and also all the other property included in and covered by said mortgage.

And as to the several persons above named who are properly parties to this bill of complaint, and not citizens of the State of Wisconsin, and who may be out of the jurisdiction of this court, your orators pray that process may be issued to make them parties, if they shall come within such jurisdiction, and that a receiver may be appointed according to the course of practice of this court, and with the usual powers of receivers in like cases, of all the property, equitable interests, things in action, effects, moneys, receipts, and earnings of said defendants, the La Crosse and Milwaukee Railroad Company, or said Chamberlain, as far as relates to said railroad from La Crosse to Portage City.

May it please your honor to grant unto your orators the people's writ of subpœna, to be issued under the seal of this court, directed to said
87 defendants, respectively, therein, and thereby commanding them on a certain day, and under a certain penalty, to be and appear before the judge of this honorable court, then and there to answer this bill of complaint, and to stand to and abide by such order and decree in the premises as shall seem meet and agreeable to equity and good conscience.

And your orators will ever pray.

GREENE C. BRONSON,
JAS. T. SOUTTER,
SHEPERD KNAPP,
Trustees.

CARY & PRATT, *Complainants' Solicitors.*
CLARKSON N. PORTER, *of Counsel.*

STATE OF NEW YORK,
City and County of New York, ss:

On this 30th day of November, 1859, personally appeared before me Greene C. Bronson, James T. Soutter and Sheperd Knapp, known to me to be the plaintiffs in the above action, who being by me severally sworn, did depose and say, the said Bronson that he had read the foregoing bill of complaint, and the said Knapp and Soutter that they had heard the same read respectively, and that they respectively knew the contents thereof, and that the said bill of complaint is true of their own knowledge, except as to the matters which are therein stated to be upon their information and belief, and as to those matters, they severally believe it to be true.

[L. S.] ALEX. OSTRANDER,
Commissioner for Wisconsin in New York.
As witness my hand and official seal the day and year aforesaid.

88 *Exhibit No.* 8.—*Bill to foreclose the second mortgage—eastern division.*

United States district court, district of Wisconsin.

JAMES T. SOUTTER AND GREENE C. BRONSON
against
THE LA CROSSE AND MILWAUKEE RAILROAD COMPANY *et als.*
} Copy of bill.

To the judge of the district court of the United States for the district of Wisconsin:

Greene C. Bronson and James T. Soutter, of the city of New York, and citizens of the State of New York, and trustees, as hereinafter mentioned, bring this their bill against the La Crosse and Milwaukee Railroad Company, a corporation created by an act of the legislature of Wisconsin, Selah Chamberlain, a citizen of the State of Ohio, Edwin Townsend, Avery Hill, Aaron V. Rudd, John H. Tesch, Franklin J. Blair, Edmund R. Persons, Ephraim Mariner, Thomas Turton, John Sercomb, Cicero Comstock,
89 Lawrence G. Graham, Donald D. Scott, Edward H. Brodhead, Dewitt C. Freeman, Sebre Howard, Joshua Hathaway, Charles Quentin, Sebastian Knetzger, Frederick Lind, August Sauthof, Moses M. Davis, Byron Kilbourn, George W. Chapman, Conrad Wellauer, citizens of the State of Wisconsin, the Milwaukee and Minnesota Railroad Company, the Milwaukee and Watertown and Baraboo Valley Railroad Company, and the Juneau

Bank, corporations doing business in the State of Wisconsin, and created by the laws of the said State of Wisconsin, Edwin C. Litchfield, E. Bradford Greenleaf, Philip S. Justice, Elkanah Cobb, John V. Bean, Philip Wilson, J. Howard Mitchell, citizens of the State of New York, the Mercantile Bank of Hartford, a corporation doing business in the State of Connecticut, and Charles Howard, a citizen of the State of Michigan, William Gemmell, a subject of Victoria, Queen of Great Britain, James Wolstenholme, a citizen of the State of Rhode Island, Newcomb Cleveland, Ebenezer Higgins, George R. Mowry, Henry K. Eastman, Henry L. Simmons, Nathaniel S. Bouton, citizens of the State of Illinois, Joshua Hathaway, a citizen of the State of Georgia; and thereupon your orators complain and say: That the said La Crosse and Milwaukee Railroad Company were created a body corporate by an act of the legislature of the State of Wisconsin approved April the 2d, in the year eighteen hundred and fifty-two, with all the privileges, franchises, and immunities incident to a corporation, and capable in law of purchasing, holding, selling, leasing and conveying estates, either real, personal, or mixed, and were authorized generally to do and perform all and singular the acts and matters which to any corporation it should lawfully appertain to do and perform for the well-being of the said corporation, and with power to locate and construct a railroad with one or more railways or tracks from a point in the village of La Crosse, in the county of La Crosse, to a point in the city of Milwaukee, and with power to transport, take, and carry property and persons upon said road, by the power and force of steam, of animals, or of any mechanical or other power; to erect and construct all such depots, station-houses, warehouses, car-houses and shops, engine-houses and shops; to manufacture or purchase all necessary engines, tenders, cars, and other conveniences for running said road; with power to borrow any sums of money from any person or persons, corporation or body politic of any kind, and at any rate of interest which may be agreed upon by and between such company and any person or party of whom such money might be obtained, any law on the subject of usury
90 in the State of Wisconsin, or any other State where such transactions might be made, to the contrary notwithstanding.

And with power to make, execute, and deliver all necessary writings, notes, bonds, mortgages, or other papers and securities of such amount and kind as might be deemed expedient by said corporation, in consideration of any such loan, or in discharge of any liabilities that it might incur in the construction, repair, equipment, or running of said road; (the powers of the said corporation for the said purposes, and for all purposes necessary to the carrying out of the object of said company, namely, the construction of a railroad from and to all points aforesaid, being thereby ratified and confirmed; and the contracts and official acts of said company declared binding in law and equity upon said corporation, and upon all other parties to said contracts.) And with power, under and by virtue of the said act and acts amendatory or supplementary to said act, and in pursuance of any acts of the legislature of the State of Wisconsin, to make, execute, issue, and deliver its bonds or obligations, and to prescribe the sum or sums for which each of said bonds shall be issued, the time or times, and place or places, when and where the principal and interest of the same should be payable, the person or persons, trustee or corporation, to whom they should be payable, and whether payable to order or bearer, or how otherwise negotiable; the rate of interest which such bonds should bear, and the manner and form in which the interest coupons annexed to them should be executed; and to secure the payment of any or all of said bonds, and in its corporate capacity to make, execute, and deliver mortgages or deeds of trust upon the whole or any part of its railroads constructed or authorized to be constructed, and

any or all the estate, real, personal, or mixed, in possession or in expectancy, and to confer upon the trustee or mortgagee full and ample powers to enter into and upon, and to take possession of, have, use, and employ, to sell and dispose of the whole or any part of said railroad or estate, together with the franchises appertaining to said railroad, and all corporate franchises, rights, and privileges of the said La Crosse and Milwaukee Railroad Company, and by its agents, or brokers, or otherwise, either in or out of the State of Wisconsin, to sell, loan, pledge, hypothecate, or otherwise dispose of any or all of the aforesaid bonds at par, or at any price less than par, and for such sum or sums, and on such terms, as to the said company, or its said agents or brokers, should appear most for the interest of the said company; and the rolling stock of said railroad company used in connection with its
91 railroad was declared to be, and is, by the statutes in such case made and provided, fixtures; and all such property, and all additional right of way, depot grounds, and all other real property acquired subsequently to the execution of any such trust deed or mortgage which may be provided for therein, should be subject to the same lien as might be created by such trust deed or mortgage upon the property therein described to which such company had title at the time of its execution.

And your orators further show that the legislature of the State of Wisconsin, on or about the eleventh day of March, 1851, passed an act to incorporate the Milwaukee and Watertown Railroad Company, whereby they were declared and created a body corporate and politic by the name and style of the Milwaukee and Watertown Railroad Company, with all the privileges, franchises, and immunities incident to a corporation.

And your orators further show that the legislature of the State of Wisconsin, on or about the 13th day of October, A. D. 1856, passed an act entitled "An act to amend an act to incorporate the La Crosse and Milwaukee Railroad Company," approved April 2d, 1852; by which said act the said La Crosse and Milwaukee Railroad Company was authorized to consolidate the capital stock with the Milwaukee and Watertown Railroad Company, and declaring that upon such consolidation all the rights and privileges, grants, franchises, and immunities conferred by the charter of said companies respectively, and by the acts amendatory thereto, should be merged in and conferred upon said consolidated company, and that all the property and estate, real and personal, should become and be the property of the said consolidated company to all intents and purposes, together with all the rights and powers of each company, by virtue of said acts, and the acts amendatory thereto.

And your orators further show that the said companies, by their acts in pursuance of said statutes, consolidated and became one company, and were authorized to act as such, and to mortgage or convey by trust deed or otherwise all the property, effects, and franchises of each or both of said corporations.

And your orators further show that the said defendant, the La Crosse and Milwaukee Railroad Company, executed, under their corporate seal, and with the signatures of their president and secretary, one thousand bonds, in each of which the said La Crosse and Milwaukee Railroad Company
92 acknowledged themselves indebted to the bearer thereof in the sum of one thousand dollars, for money borrowed for the construction of their road, and which sum they agreed to pay to the bearer thereof, on the first day of September, 1870, at the Bank of the Republic, in the city of New York, with interest at the rate of eight per centum per annum, payable in the city of New York, semi-annually, on the first day of March and the first day of September in each year, on presentation and delivery of the interest warrants or coupons thereto annexed, which said coupons were by their terms

payable at said Bank of the Republic, and all of the said bonds were of the same tenor, and numbered from one to one thousand respectively, making in all one million dollars; and the same were all dated September 1st, 1857.

And your orators further show that all of said bonds were duly registered and countersigned by your orators, as trustees, and delivered to said company, and the same have been sold, transferred, and delivered by said company to divers persons, and the same are now held and owned as existing claims; and, as collateral security for the payment of the said bonds, or the monies therein mentioned, and the interest thereon to become due and payable from time to time, the said defendant, the La Crosse and Milwaukee Railroad Company, in consideration of one dollar, executed a mortgage or deed of trust, dated the 17th day of August, 1857, to your orators, Greene C. Bronson and James T. Soutter, of the city and State of New York, and duly acknowledged and delivered the same to your orators; whereby they granted, bargained, sold, conveyed, and confirmed unto your orators all and singular the railroad of said company, commencing in the city of Milwaukee, and running from thence to Portage City, a distance of ninety-five miles, which road had then been constructed, and was in full operation; and also the railroad of the said company (as well that part which had then been constructed as that part which remained to be constructed) from Watertown, by way of Columbus, to Midland, (where it connects with the main line of the railroad of said company,) a distance of forty miles, one-half of which last-mentioned road, being the part between Watertown and Columbus, had been constructed and was then in full operation, including all and singular the several tracts, pieces, or parcels of land which then were or might thereafter be or constitute the site of the roadways, turn-outs, engine-houses, workshops, depots, and other buildings, and all the other lands and real estate which then constituted, or might thereafter constitute, or be part of, or appertain to, the said railroads, or either of them; and also all
93 and singular the superstructure of said railroad, whether then made or to be made thereafter, and all the engine-houses, workshops, depots, and other buildings, and all the other improvements on or appertaining to said railroads, or either of them, whether then built or made or to be built and made thereafter; and also all and singular the locomotive engines and other rolling stock, and all the other equipments of every kind and description, which had already been or might thereafter be procured for or used on said railroads, or either of them; and all the materials, tools, implements, and utensils, and other personal property which had been or might thereafter be procured for or used in connection with the said railroads, or either of them; and also all and singular the rights, liberties, privileges, and franchises of said railroad company, so far as they relate to said railroads from Milwaukee to Portage City, and from Watertown, by way of Columbus, to Midland aforesaid. And it was thereby declared to be the intention of the parties to the said trust deed or mortgage to convey to and vest in your orators all the property, real and personal, of the said railroad company, to be acquired thereafter, as well as that which had already been acquired, together with all the rights, privileges, and franchises of said railroad company in respect to said railroads from Milwaukee to Portage City, and from Watertown, by way of Columbus, to Midland, as fully and as amply as the same might be conveyed if said railroads had then been fully constructed and equipped; but said railroad from Milwaukee to Portage City was by the said mortgage declared to be subject to a first mortgage on the same of ten thousand dollars a mile, amounting in the aggregate to nine hundred and fifty thousand dollars; and the first eighteen miles of said road from Milwaukee westward was declared to be subject to a second mortgage of one hundred and fourteen thousand dollars; and the next forty miles of

said road westward of the said eighteen miles was declared to be subject to a second mortgage of two hundred thousand dollars.

And your orators further show that the said conveyance to your orators in and by said trust deed or mortgage were declared to be upon the trusts, terms, and conditions therein expressed as follows:

1st. Until default should be made in the payment of the said bonds, or some of them, or the interest thereon, that the said railroad company should be suffered and permitted to hold and enjoy such railroads, with the equipments, and all other things appertaining to the same, and to use the same, and to take and receive the income and profits thereof to its own
94 use, in the same manner as though the said deed had not been made.

2d. In case default for the space of sixty days should be made in the payment of any of said interest warrants or coupons, as they should respectively fall due, or if default for the like period should be made in the payment at maturity of the principal sum of money mentioned in any of the said bonds, then, and in either of the said cases, it should be lawful, and your orators were thereby authorized in their discretion, either in person or by their attorney or attorneys, agent or agents, to enter into and upon, and take possession of, all and singular the railroads, and all the other property, real and personal, thereinbefore conveyed or intended to be conveyed, and to take and receive the income and profits thereof, and to sell all and singular said railroads and other property, with all the rights, liberties, privileges, and franchises of said railroad company, in respect to said railroads from Milwaukee to Portage City, and from Watertown, by way of Columbus, to Midland, either at private or public sale; and to execute and deliver to the purchaser or purchasers deeds and conveyances, which should vest in such purchaser or purchasers all the estate, right, title, and interest, whether legal or equitable, of your orators and said railroad company, of, in, or to said property, rights, liberties, privileges, and franchises, and every part and parcel thereof.

But before any sale should be made at auction, notice of such intended sale should be published once in each week for twelve weeks at the least, in two newspapers published in the city of New York, and in a newspaper published in the city of Milwaukee; and should any further notice be required by the laws of the State of Wisconsin, the same should be given. And in case the interest in default should be at any time equal to the amount of the interest for one year on all the bonds then outstanding, or in case default should be made in the payment of the principal sum of money mentioned in said bond, or any of them, at maturity, that then, and in either of said cases, your orator, on the written request of the holder or holders of the major part in amount of the bonds then outstanding, should proceed to make such sales and conveyances as are above mentioned.

And your orators further show that the said defendant, the La Crosse and Milwaukee Railroad Company, in and by said trust deed or mortgage, covenanted and agreed, to and with your orators, and the survivor and successor of them, that said company would, from time to time during the continuance of the trust, make, execute, and cause to be duly recorded,
95 and deliver to your orators, all such further conveyances and assurances, and would do all such further acts and things, as might either be necessary or proper for more effectually vesting in your orators all such rights, title, interest, or estate, both legal and equitable, as said company then had or might thereafter acquire of, in, or to all and every part of the property thereby conveyed or intended to be conveyed, together with the rights, liberties, privileges, and franchises aforesaid. And that the said defendant, the La Crosse and Milwaukee Railroad Company, in and by the said

trust deed or mortgage, further covenanted and agreed with your orators that they would, from time to time, pay all costs, charges, expenses, and compensation of your orators in, about, or for the execution of the trust, and would in all things keep them fully indemnified and saved harmless of, from, and against all damages, costs, charges, and expenses which they might sustain or be put to in consequence of accepting the trust, or of anything which might be done or omitted under it, saving only such damage as might arise from the culpable act or neglect of your orators. And the said company authorized your orators to appoint all such attorneys, counsellors, clerks, and other agents as they might deem proper in the execution of the trust, and agreed that they should not be answerable for the defaults or other misconduct of such attorneys, counsellors, or other agents, unless chargeable with culpable negligence in their selection; nor should your orators be responsible for anything short of gross negligence or willful default in the discharge of any of their duties; nor should either of your orators be answerable for the acts, omissions, or defaults of his associate. And the said railroad company, in and by the said trust deed or mortgage, covenanted and directed that all moneys which might be received by your orators under the said trust deed, after deducting therefrom all costs, counsel fees, charges, and other expenses of your orators, and their compensation for executing the trust, should be applied to the payment of the bond which might be issued under the trust, and the surplus, if any, should be paid to the company. All of which, by reference to the said trust deed or mortgage, now ready to be produced as this court shall direct, will more fully and at large appear.

And your orators further show that the said mortgage was duly witnessed and acknowledged, and was afterwards, and on the twenty-first day of August, 1857, duly recorded in the office of the secretary of the State of Wisconsin, in the Book of Railroad Mortgages, on pages 234, 235, 236,
96 237, 238, and 239, as by the certificates on said mortgage will more fully appear.

And your orators further show that the defendant, the La Crosse and Milwaukee Railroad Company, has failed to comply with their covenants and agreements as contained in said several bonds, and in said trust deed or mortgage, in omitting to pay the interest on the said bonds, respectively, which fell due and payable on the first day of September, A. D. 1859, amounting upon each bond to the sum of forty dollars, and upon all the bonds, in the aggregate, to the sum of forty thousand dollars, and that there is now justly due upon the said bonds the sum of forty thousand dollars, and the interest thereon from September 1st, A. D. 1859.

And your orators further show that no proceedings have been had at law or otherwise, to their knowledge or belief, for the recovery of the said sum of forty thousand dollars; the said interest on said bonds still remains due and payable.

And your orators further show that the defendant, the La Crosse and Milwaukee Railroad Company, did not deposit with, or leave with, or in any form provide at the Bank of the Republic, in the city of New York, at or about the first day of September, 1859, or on any day before the filing of this bill, any sum of money for the payment of the said interest, due and payable on the said first day of September, according to the said trust deed or mortgage, at the said Bank of the Republic, or at any other place, to the knowledge or belief of your orators.

And your orators further show that the payment of the said interest has been demanded of the said Bank of the Republic since the same became due and payable, and that payment thereof was refused.

And your orators further show that by and in pursuance of said mortgage

or deed of trust, on such default, your orators were, as they have been advised and believe, entitled to take possession of the said railroads, and secure the income and profits thereof, and that, in pursuance of such power, your orators have demanded the possession of said railroad from the city of Milwaukee to Portage City, with the income and profits thereof, but that the same was refused and denied to your orators.

And your orators further show that on or about the 26th day of September, 1857, the said defendant, the La Crosse and Milwaukee Railroad Company, executed and delivered to the defendant, Selah Chamberlain, a certain writing under the corporate seal of the said railroad company, termed
97 a lease, a copy of which is hereto attached and made part of this your orators' bill; that the said writing or lease, by its terms, gave to the said Selah Chamberlain the exclusive possession and the entire control of the entire line of railroad of the said La Crosse and Milwaukee Railroad Company, being between the cities of Milwaukee and La Crosse, including the said portion between the city of Milwaukee and Portage City, conveyed to your orators aforesaid, upon the trust, however, that after paying the necessary running expenses, &c., he should pay, not only the interest secured by the said trust deed or mortgage to your orators, but also the interest and sinking funds mentioned and described in the said mortgage or trust deed of your orators as prior liens and incumbrances thereto.

And your orators further state that the said defendant, Selah Chamberlain, at or about the time of the execution of the said writing or lease, went into the actual possession of all the said railroad therein described, and has been ever since and is now in the actual possession thereof.

And your orators further state, on information and belief, and charge, that at the time of the execution of the said writing or lease from the said La Crosse and Milwaukee Railroad Company to the said Selah Chamberlain, as aforesaid, the said company were entirely and hopelessly bankrupt, and that the said writing or lease was executed for the purpose of securing to the said Chamberlain the payment of the indebtedness specified in the said writing or lease; and your orators show that the same was subsequent to the said mortgage of your orators and subject thereto.

And your orators further show that the said railroad from Watertown to Milwaukee, by way of Columbus, is only partially built; that without its connection with the railroad from Milwaukee to Watertown, it is only a short isolated piece of road, of little or no value, and that the same has been sold and conveyed by the said La Crosse and Milwaukee Railroad Company to the Milwaukee, Watertown, and Baraboo Valley Railroad Company, and that, from its entire inadequacy as security, your orators are obliged to look to the said railroad from Milwaukee to Portage City, with its appurtenances and rolling stock, as their principal security.

And your orators further state, upon information and belief, that neither the said defendant, the La Crosse and Milwaukee Railroad Company, nor the defendant, Selah Chamberlain, nor any one for them, has paid the interest due and payable upon the indebtedness of the said La Crosse
98 and Milwaukee Railroad Company, which are and were liens upon the said railroad from Milwaukee to Portage City, with its equipments, rolling stock, depot grounds, and appurtenances, prior to the lien created by the said trust deed or mortgage to your orators, that is to say: the interest due upon nine hundred and fifty thousand dollars, on the first day of November, 1859; on the interest due upon three hundred and fourteen thousand dollars, on the first day of September, 1859, amounting in the aggregate to the sum of forty-eight thousand nine hundred and ninety dollars, according to the terms and conditions of bonds issued by the defendant, the La Crosse and Milwaukee Railroad Company, out of bonds the payment of

which has been assumed by them, and all of which are secured by mortgages or deeds of trust, or in some way which constitutes them prior incumbrance to the said trust deed or mortgage of your orators, whereby the security of your orators has become greatly jeoparded.

And your orators further state that on their information and belief, that the said railroad, with their appurtenances included in said mortgage or deed of trust to your orators, is a slender and insufficient security for the payment of the sums of money and the interest thereon which are liens upon the said railroads, and upon the property included and intended to be included in the said deeds of trust and prior to and including the liens created by the mortgage or deed of trust to your orators, as before set forth ; and that while the said railroad from Milwaukee to Portage City is in the possession of the said defendant, Selah Chamberlain, it will greatly deteriorate in value for the want of necessary repairs, while the indebtedness secured thereby is increasing by reason of the non-payment of interest.

And your orators further state, upon information and belief, that the said mortgage or trust deed to your orators as aforesaid conveyed a large number of locomotive engines and rolling stock of various descriptions, and together of very great value, at least to the value of $300,000 ; that the same belonged to and were a part of the said railroad from Milwaukee to Portage City ; and that the same have been and are used by the said Selah Chamberlain for other purposes than for the working of the said railroad embraced in the said mortgage or deed of trust to your orators, are daily deteriorating in value, and that the earnings therefrom are diverted to other purposes than the payment of the interest accruing on the said liens on the said railroad, whereby your orators charge that the security of the said trust deed or mortgage to your orators has become and is of
99 much less value—of at least fifty thousand dollars less value—than it would have been if the use of the said engines and rolling stock had been confined to the said railroad, or if the earnings therefrom had been applied towards the payment of the said interest.

And your orators further state that default of more than sixty days has been made in the payment of the interest warrants and coupons attached to the said bonds due and payable on the first day of September, 1859, and that by the said deed of trust, your orators, upon the happening of that event, were by said deed of trust authorized and empowered, by themselves, their attorney or attorneys, agent or agents, to enter into and upon and take possession of all and singular the said railroads and all other property included or intended to be included in the said deed of trust, and to sell the same, either at public or private sale, and give a good conveyance of the same.

And your orators further state that they have applied for the possession of said road and its appurtenances, and for further conveyances, according to the covenants and agreements on the part of the defendants, the La Crosse and Milwaukee Railroad Company, but that the said defendant, the La Crosse and Milwaukee Railroad Company, have refused to give up to your orators, or their attorneys or agents, said railroad, with their appurtenances, or to give to your orators such further conveyances or assurances.

And your orators further state that all the said bonds are made payable to bearer, and are negotiable by delivery, and that, as your orators believe, many of them are now held by various parties unknown to your orators ; and that many of said bondholders, holding in the aggregate six hundred bonds, have requested your orators to proceed to enforce the lien of the said trust deed or mortgage, and to take such proceedings at law or in equity as to your orators might seem best to make their said security available. That the said bondholders are principally non residents of this State, and that this bill is filed in the name of your orators, but for the benefit and

security of all of said bondholders; that the number of said bondholders is so great that they cannot, without manifest inconvenience and oppressive delays in this suit, be all brought before the court, and that your orators fully represent in this suit the interests of all said bondholders.

And your orators further state that the said defendants, the Milwaukee and Minnesota Railroad Company, Selah Chamberlain, Sebre Howard,
100 Conrad Wellauer, Edward H. Brodhead, Newcomb Cleveland, William Gemmel, Josiah Hathaway, James Wolstenholme, Edward C. Litchfield, Ebenezer Higgins, George R. Mowry, Henry K. Eastman, Henry L. Simonds, Dewitt C. Freeman, E. Bradford Greenleaf, Frederick Lind, Sebastian Knetzger, Lawrence G. Graham, Donald G. Scott, Thomas Turton, John Sercomb, Ephraim Mariner, Avery Hill, A. V. Rudd, Franklin J. Blair, Edmund R. Persons, Philip S. Justice, Elkanah Cobb, John V. Bean, Philip Wilson, J. Howard Mitchell, Edwin Townsend, the Mercantile Bank of Hartford, Connecticut, August Sauthof, Charles Quentin, John H. Tesch, Byron Kilbourn, Nathaniel S. Bouten, the Juneau Bank, the Milwaukee, Watertown, and Baraboo Valley Railroad Company, Cicero Comstock, and George W. Chapman, Moses M. Davis and Charles Howard, have or claim to have some interest in the mortgaged premises as subsequent purchasers or incumbrances or otherwise.

To the end, therefore, that the said defendants may, if they can, show why your orators should not have the relief hereby prayed, and may, upon their several respective corporal oaths, and according to the best and utmost of their several and respective knowledge, remembrance, information, and belief full, true, direct, and perfect answer make to this your orators' bill; and that the said defendants, the La Crosse and Milwaukee Railroad Company may be adjudged to pay to your orators, as trustees for the benefit of the said bondholders, the arrears of interest before mentioned and now due or hereafter to become due and payable thereon, together with the costs and charges in this behalf expended; and in default thereof that the said defendants, and all persons claiming or to claim under them or either of them, or otherwise may be forever barred and foreclosed of and from all equity of redemption and claim of, in, and to the said mortgaged premises, and those included in the said trust deed and every part thereof, with all and every the appurtenances, and that they may be adjudged and decreed to deliver over to your orators, or their attorney or agent, the possession of the said railroad and all its appurtenances, and all its books, title deeds, and writings in relation to the same, and that all the income of the said road may be applied to the payment of said monies due and to become due, and that all and singular the said property mentioned or intended so to be in the said mortgage or trust deed may be sold under and according to the decree of this court; and that out of the money arising from the sale thereof your orators may be paid all the principal and interest due or to become due upon the said
101 bonds and all the interest which is now due and may become due thereon, together with all the costs and charges by them in this behalf sustained or entitled to, and that the said defendant, the La Crosse and Milwaukee Railroad Company, be adjudged to pay any deficiency which may remain after applying all of said monies so applicable thereto, and that your orators may have such other or further relief, order or decree, or both, in the premises, as shall be just and equitable; and that in the mean time your orators, their agents or attorneys, may have authority to take possession of the said railroad and its appurtenances, and secure all the income thereof, or that a receiver may be appointed according to the course and practice of this court, and with the usual powers of receivers in like cases of said roads and all their appurtenances, receipts, and earnings; and that until the final decree in this suit the said La Crosse and Milwaukee Railroad Company,

their attorneys, counsellors, officers, agents, trustees, treasurers, and all persons acting under them or either of them, and the said Selah Chamberlain, his agents, servants, and attorneys, may be restrained, injunction issuing out of this court, from using any of the engines, cars, or other property included in said mortgage or deed of trust for any purpose whatever. May it therefore please your honor to grant unto your orators a writ of injunction, issuing out of and under the seal of this court, directed to the defendants, directed to the said La Crosse and Milwaukee Railroad Company, and Selah Chamberlain, and each of them, their attorneys, solicitors, agents, and all other persons acting under them, commanding them and each of them absolutely to desist and refrain from using any of the engines, cars, or any of the property included in the said mortgage or deed of trust, for any purpose whatever. May it please your honor to grant to your orators a writ of subpœna, commanding the said defendants, the La Crosse and Milwaukee Railroad Company, the Milwaukee and Minnesota Railroad Company, Selah Chamberlain, Sebre Howard, Conrad Wellauer, Edward H. Brodhead, Newcomb Cleveland, William Gemmel, Joshua Hathaway, James Wolstenholme, Edwin C. Litchfield, Ebenezer Higgins, George R. Mowry, Henry K. Eastman, Henry L. Simonds, Dewitt C. Freeman, E. Bradford Greenleaf, Frederick Lind, Sebastian Knetzger, Lawrence G. Graham, Donald D. Scott, Thomas Turton, John Sercomb, Ephraim Mariner, Avery Hill, A. V. Rudd, Franklin J. Blair, Edmund R. Persons, Philip S. Justice, Elkanah Cobb, John V. Bean, Philip Wilson, J. Howard Mitchell,
Edwin Townsend, the Mercantile Bank of Hartford, Ct., August
102 Sauthof, Charles Quentin, John H. Tesch, Byron Kilbourn, Nathaniel
S. Bouten, the Juneau Bank, the Milwaukee, Watertown and Baraboo Valley Railroad Company, Cicero Comstock, George W. Chapman, Moses M. Davis, and Charles Howard, commanding them and each of them,

[redacted]

JAMES S. BROWN,
Of Counsel.

DISTRICT OF WISCONSIN, *ss:*

P. Dow, being duly sworn, saith that Greene C. Bronson and James T. Soutter, the complainants in the foregoing bill, are now in the city of New York, as deponent verily believes; that this deponent is the attorney in fact of the said Greene C. Bronson and James T. Soutter by virtue of a power of attorney, under seal, for the purpose of instituting this suit; that this deponent has read said bill of complaint and knows the contents thereof, and that the same is true to his own knowledge, except as to the matters stated on information or belief, and as to those matters he believes it to be true.

P. DOW.

Subscribed and sworn to before me December 9th, A. D. 1859.

JNO. M. MILLER, *Clerk.*

103 *Exhibit No. 9.—Order of reference in western division foreclosure cause.*

UNITED STATES OF AMERICA,
District of Wisconsin, ss:

At a stated term of the district court of the United States of America, for

the district of Wisconsin, begun and held according to law, at the city of Milwaukee, in said district of Wisconsin, on the first Monday (being the seventh day) of January, A. D. 1861.

Present: The Honorable Andrew G. Miller, judge of said court, presiding.

On the twenty-third day of said term, to wit, on the 11th day of March, 1861, the following proceedings were had, to wit:

GREENE C. BRONSON, JAMES T. SOUTTER, AND Sheperd Knapp, trustees,
vs.
LA CROSSE AND MILWAUKEE RAILROAD COMPANY, J. Albert Helfenstein, trustee, *et als.*
} In equity.

This day came the parties, by their counsel, and on consideration of the pleadings, proofs, and the arguments of counsel, it is ordered by the court that reference be, and hereby is, made to Winfield Smith, a master, and to Jerome R. Brigham and Joshua Hathaway, special masters, to ascertain and report the amount of interest due and unpaid on the bonds described in the mortgage or deed of trust, and the real amount of said bonds.

104 And the said masters shall ascertain and report the amounts of the several judgments of Newcomb Cleveland, Sebre Howard, and of Graham & Scott.

And it is further ordered that the said master report the amount of the several specific claims of Selah Chamberlain, and also an account of his receipts, set-offs, and credits, and of such as should be made to his claims, including his receipts of revenues of the whole road, without regard to its divisions by the mortgages, and that they may examine the said Chamberlain under oath, and require him to produce his books and they may also take additional testimony to that on file.

[redacted]

105 *Exhibit No.* 10—*Masters' report in western division foreclosure cause.*

District court of the United States for the district of Wisconsin.

GREENE C. BRONSON, JAMES T. SOUTER, AND Sheperd Knapp, trustees,
vs.
THE LA CROSSE AND MILWAUKEE RAILROAD COMPANY, J. Albert Helfenstein, trustee, *et als.*

To the Hon. A. G. Miller, judge:

In pursuance and by virtue of an order of reference made in this cause on the eleventh day of March, A. D. 1861, and of an order supplementary thereto, made on the twenty-first day of March, A. D. 1861, we, the undersigned, Winfield Smith, a master, and Jerome R. Brigham and Increase A. Lapham, special masters of this court, do respectfully report:

That we have been attended by the counsel for the parties, and have taken proofs in regard to the matter referred by the said order, in addition

to that on file, which proofs are herewith returned, consisting of the copies of depositions and of exhibits, the originals whereof are returned by us and filed in this court, in the other cause depending in said court, in which
106 the said depositions and exhibits have been taken, on an order of reference and order supplementary thereto, made of the same dates as above; in which cause Greene C. Bronson and James S. Soutter, trustees, are complainants, and the said La Crosse and Milwaukee Railroad Company and others are defendants.

We further report that we have passed over the line of the railroad of the said La Crosse and Milwaukee Railroad Company, and have examined those portions thereof where any of the work done by the defendant, Selah Chamberlain, as stated in the pleadings and testimony in this cause, was performed. Previous to which we gave notice of our intended examination to the counsel for the defendant, Chamberlain, and to the counsel for the defendants, Howard, Graham, and Scott, and the Milwaukee and Minnesota Railroad Company, informing them that they and engineers selected by them were at liberty to accompany us and assist in making such examination. We also endeavored, but without success, to procure the attedance and aid of Mr. Benjamin H. Edgarton, a civil engineer, whose testimony is among the depositions taken by us, as above stated.

We have ascertained and computed the amount of interest due and unpaid on the bonds described in the mortgage or deed of trust to the complainants, set forth in the bill of complaint in this cause, and the real amount of the said bonds.

The real amount of those of the said bonds, numbered from one to one thousand nine hundred ninety-one, inclusive, being 1,991 bonds first issued, of one thousand dollars each, at one hundred cents on the the dollar, is one million nine hundred ninety-one thousand dollars, ($1,991,000.) The inter est thereon from February 1, 1857, to the date thereof, at seven per cent., is $638,779 17, (six hundred thirty-eight thousand seven hundred seventy-nine dollars and seventeen cents;) of which sum there is due upon the coupons attached to said bonds, and payable in February and August of each year, the sum of six hundred twenty-seven thousand one hundred sixty-five dollars, which sum has been due since the first day of August, A. D. 1861.

The real amount of those of the said bonds numbered from one thousand nine hundred ninety-two to two thousand five hundred, both inclusive, being 509 bonds of one thousand dollars each, allowed at forty cents on the dollar, is two hundred three thousand six hundred dollars, ($203,600.) The inter-
est thereon, from February 1st, 1857, to date hereof, at seven per
107 cent., is $65,321 67, (sixty-five thousand three hundred twenty-one dollars and sixty-seven cents.)

The real amount of the remainder of the said bonds, being 1,450 bonds of one thousand dollars each, numbered from two thousand five hundred and one to three thousand nine hundred and fifty, both inclusive, and one hundred bonds of five hundred dollars each, numbered from one to one hundred, both inclusive, allowed at forty cents on the dollar, is six hundred thousand dollars, ($600,000.) The interest thereon from February 1st, 1857, to the date hereof, at the rate of seven per cent., is $192,500, (one hundred ninety-two thousand five hundred dollars.)

Thus the real amount of all the said bonds is $2,794,000, on which the interest unpaid to the date hereof is $896,600 84.

We have also ascertained the amount of the judgment of Newcomb Cleveland, mentioned in the said order, which is now equitably owned by the defendant, Selah Chamberlain. The same was rendered on the seventh day of October, A. D. 1857, for damages, $111,727 71; costs, $544 15. And there

was paid thereon, under the order of this court, April 22, 1861, in full of interest and costs to that date, the sum of $28,801 92.

The interest on the amount then due, at seven per cent., from that date to June 29th, 1861, is	$1,455 56
Adding principal	111,727 71
The total due was	113,183 27
Upon which date was paid	10,000 00
Leaving due June 29th, 1861	103,183 27
Upon which the interest to July 18th, 1861, at 7 per cent., is	381 20
The amount then due was	103,564 47
Upon which date was paid	20,000 00
Leaving due at that date	83,564 47
On which interest to the date hereof is	698 68
The amount due at this date is	84,263 15

Eighty-four thousand two hundred sixty-three dollars and fifteen
108 cents.

We have also ascertained the amount of a certain judgment rendered in favor of Newcomb Cleveland against the La Crosse and Milwaukee Railroad Company, in the circuit court for Milwaukee county, on the twentieth day of April, A. D. 1859.

There is due thereon, at the date hereof, damages and costs	$3,718 60
Interest to the date hereof	614 60
The amount due at this date is	4,333 02

We have also ascertained the amount of a certain other judgment rendered in favor of Newcomb Cleveland against the La Crosse and Milwaukee Railroad Company, in the circuit court for Milwaukee county, on the twentieth day of April, A. D. 1859.

There is due thereon, at the date hereof, damages and costs	$1,525 71
Interest to the date hereof	252 14
The amount due at this date is	1,777 85

We have also ascertained the amounts of the judgments of Sebre Howard, mentioned in his answer filed in this cause. The amount of his judgment rendered in the said circuit court is included and embraced in the judgment rendered in his favor by this court, (on the law side thereof,) on the twenty-eighth day of November, A. D. 1859; on which last-named judgment there is due at the date hereof:

Damages and costs	$16,379 86
Interest to the date hereof	2,013 39
The amount due at this date is	18,393 25

pal secured by, the bonds issued under the deed of trust or mortgage given your orators, and described in the complainants' bill of complaint, and also to ascertain and report the whole amount of rolling stock on the whole road, and which of the mortgages on said road covered and included said rolling stock:

1st. For that the said master and special masters have in and by their said report certified that the real amount of the bonds secured by the mort-
113 gage given to said complainants, numbered from 1992 to 2500, both inclusive, being 509 bonds of one thousand dollars each, was two hundred and three thousand and six hundred dollars, and that the interest thereon from February 1st, 1857, to the date of said report, at 7 per cent., was sixty-five thousand three hundred and twenty-one dollars and sixty-seven cents; whereas the said master and special masters ought to have certified that the real amount of the principal of the said bonds was $509,000 00, and the interest thereon from February 1st, 1857, to date of said report, at seven per cent., was $163,304 22.

2d. For that the said master and special masters have in and by their said report certified that the real amount of said bonds, numbered from 2501 to 3950, both inclusive, being 1,450 bonds of $1,000 each, and one hundred of said bonds of $500 each, numbered from one to one hundred, both inclusive, as allowed by them, was six hundred thousand dollars, and the interest thereon from February 1st, 1857, to the date of said report, at seven per cent., was $192,500; whereas the said master and special masters ought to have certified that the real amount of principal of said bonds was $1,500,000, and the interest due thereon from February 1st, 1857, to the date of said report, at seven per cent., was $481,250 00.

3d. For that the said master and special masters have in and by their said report certified that the real amount of all the said bonds was $2,794,000 00, on which the interest unpaid to the date of said report is $896,600 84, making in all the amount of $3,690,600 84; whereas the said master and special masters ought to have certified that the real amount of principal unpaid of said bonds was $4,000,000 00, and the interest due and unpaid thereon, $1,283,333 39, making an amount of $5,283,333 39.

4th. For that the said master and special masters have in and by their said report certified that all the rolling stock on said road (except 40 box cars, which are specially named in said report) was covered by and included in the first mortgage upon the said railroad and in the mortgage upon the said railroad executed to Greene C. Bronson and James T. Soutter, and bearing date on the 17th day of August, A. D. 1857; whereas the said master and special masters ought to have certified that all the rolling stock on said road (except that purchased by the receiver since the commencement of this
114 suit, amounting to the sum of $53,600) was covered by and included in the mortgage given to the said complainants, and described in the bill of complaint in this cause, and that said mortgage was a first and prior lien on said rolling stock, superior to all other liens; and that as to the rolling stock purchased by said receiver above mentioned, 105-200 thereof was covered by the mortgage described in the complaint, and that to that extent the complainants' said mortgage was a first lien thereon.

Whereof said complainants except to the said master and special masters' said report, and appeal therefrom to the judgment of this honorable court.

CARY & PRATT, *Solicitors for Claimants.*

Filed Nov. 2d, 1861.

115 *Exhibit No.* 12.—*Order of court on masters' report in western division foreclosure cause.*

UNITED STATES OF AMERICA,
District of Wisconsin, ss:

At a stated term of the district court of the United States of America for the district of Wisconsin, begun and held according to law, at the city of Milwaukee, in said district of Wisconsin, on the first Monday (being the sixth day) of January, A. D. 1862.

Present: The Honorable Andrew G. Miller, judge of said court, presiding.

On the second day of the said term, to wit, on the seventh day of January, A. D. 1862, the following proceedings were had:

GREENE C. BRONSON, JAMES T. SOUTTER, AND SHEPERD KNAPP, trustees,
vs.
LA CROSSE AND MILWAUKEE RAILROAD COMPANY, J. ALBERT HELFENSTEIN, trustee, *et als.*
} In equity.

This day came the parties, by their counsel, and on consideration of the several exceptions to the report of the masters, and the arguments of counsel, it is ordered by the court that the first, second, and third exceptions of complainants to said report be, and hereby are, overruled.

116 And it is further ordered by the court that the fourth exceptions of complainants be, and is hereby, overruled as to the forty box cars which are covered by this mortgage. And it is further ordered by the court that on said exception the said report be so modified that all the other rolling stock that was on said road when the receiver was appointed, except the said forty box cars, is covered by and included in the first mortgage of the road from Milwaukee to Portage City; and that all the rolling stock on said road that has been purchased or procured since the court has held possession by its receiver, costing $147,942 63, be applied to the said first mortgage and the mortgage in this bill, in proportion to the net revenues on such portions of the road said mortgages, respectively, covered since the appointment of the receiver.

And it is further ordered by the court that the sixth and seventh exception of Selah Chamberlain to said report be, and hereby are, allowed; and that the tenth exception of said Chamberlain to said report be, and hereby is, overruled. And it is further ordered that the remaining other exceptions of said Selah Chamberlain be held by the court for further consideration.

117 *Exhibit No.* 13.—*Decree in western division foreclosure cause.*

UNITED STATES OF AMERICA,
District of Wisconsin, ss:

At a stated term of the district court of the United States of America for the district of Wisconsin, begun and held according to law, at the city of Milwaukee, in said district of Wisconsin, on the first Monday (being the sixth day) of January, A. D. 1862.

Present: The Honorable Andrew G. Miller, judge of said court, presiding.

On the sixth day of the said term, to wit, on the thirteenth day of January, A. D. 1862, the following proceedings were had, to wit:

GREENE C. BRONSON, JAMES T. SOUTTER, and SHEPERD KNAPP, trustees,
vs.
LA CROSSE AND MILWAUKEE RAILROAD COMPANY, J. ALBERT HELFENSTEIN, trustee, Selah Chamberlain, Newcomb Cleveland, Edwin Townsend, Franklin J. Blair, Edmund R. Persons, Leman Graham, Daniel D. Scott, Avery Hill, A. V. Rudd, E. Bradford Greenleaf, John H. Tesch, Dewitt C. Freeman, Ephraim Mariner, Thomas Turton, John Sercomb, Sebastian Knetzger, Frederick Lind, Edward H. Brodhead, Joshua Hathaway, William Gemmell, Charles Quentin, August Sauthoff, Sebre Howard, Lawrence G. Graham, Donald D. Scott, the Milwaukee and Minnesota Railroad Company, Moses M. Davis, James Wolstenholme, Guy Tracy, Horace Galpin, Edward Livermore, William Crawshay, Henry G. Gilbert, John Hardy, George W. Berrian, George Strobel, G. R. Van Allen, James G. Fulton, Moses A. Hoppock, Lereno Gaylord, C. Lewis Zimmerman, Daniel Goodwin, Stephen A. Dodge, Charles F. Deitz, William Wood, Benjamin F. Dawson, James W. Wood, John Wells, Ruric Martin, R. F. Barton, D. M. Corbell, D. Farnsworth, Harvey Terry, James J. Day, W. Catlin, Bruce & Young, John M. Trift, Jonathan P. Hopper, D. S. Kingore, Noah Sturdevant, William H. Fessenden, John L. Southerland, E. Haskett Derby, Frederick Levick, Charles Shephard, C. P. Williams, Orville Oddie, John Pemberton, Niles Higgenbotham, George Ashley, William Gould, Nathan Marble, Jacob Van Vechten, John J. Vanderbilt, T. F. Bergen, G. S. Boardman, and John Nicholson.

118 In equity.

This day this cause came on to be finally heard at this term, upon the bill taken as confessed against the defendants, La Crosse and Milwaukee Railroad Company, Newcomb Cleveland, Edwin Townsend, Franklin J. Blair, Edmund R. Persons, Avery Hill, A. V. Rudd, John H. Tesch, Dewitt C. Freeman, Ephraim Mariner, Thomas Turton, John Sercomb, Edward H. Brodhead, Joshua Hathaway, Charles Quentin, Lawrence G. Graham, Donald D. Scott, the Milwaukee and Minnesota Railroad Company, and Moses M. Davis, and upon the bill and the answers of the defendants, Selah Chamberlain, J. Albert Helfenstein, trustee in a mortgage or deed of trust of said company, defendants, James Wolstenholme, Guy Tracy, Horace Galpin, Edward Livermore, William Crawshay, Henry G. Gilbert, John Hardy, George W. Berrian, George Strobel, G. R. Van Allen, James G. Fulton, Moses A. Hoppock, Lereno Gaylord, C. Lewis Zimmerman, Daniel Goodwin, Stephen A. Dodge, Charles F. Deitz, William Wood, Benjamin F. Dawson, James W. Wood, John Wells, Ruric Martin, R. J. Burton, D. M. Corbell, D. Farnsworth, Harvey Terry, James J. Day, W. Catlin, Bruce & Young, John M. Tuft, Jonathan P. Hopper, D. S. Kingore, Noah Sturdevant, William H. Fessenden, John L. Southerland, E. Haskell Derby, Frederick Levick, Charles Shepard, C. P. Williams, Orville Oddie, John Pemberton, Niles Higgenbotham, George Ashley, William Gould, Nathan Marble, Jacob Van Vechten,
T. F. Bergen, John J. Vanderbuilt, G. S. Boardman, and John Nicholson,
119 and the replications thereto and proof, and was argued by counsel; and thereupon, upon consideration thereof, it was ordered, adjudged, and decreed by the court as follows, to wit, that the report of Winfield Smith, master, and of Jerome R. Brigham and Increase A. Lapham, special masters, appointed by this court, wherein the sum of six hundred and thirty-

eight thousand seven hundred and seventy-nine dollars and seventeen cents appears to be due to said complainants at the date of said report for interest on the bonds in the mortgage mentioned in this bill, numbered from one to nineteen hundred and ninety-one, both inclusive, and one million nine hundred and ninety-one thousand dollars for principal on the said bonds; and also sixty-five thousand three hundred and twenty-one dollars and sixty-seven cents for interest on five hundred and nine of the said bonds included in said mortgage, numbered from nineteen hundred and ninety-two to twenty-five hundred, both inclusive, and two hundred and three thousand six hundred dollars for principal of the sum; and also one hundred and ninety-two thousand five hundred dollars for interest on fourteen hundred and fifty of said bonds of one thousand dollars each, included in said mortgage, numbered from two thousand five hundred and one to three thousand nine hundred and fifty, both inclusive, and on one hundred of said bonds mentioned in said mortgage of five hundred dollars each, and numbered from one to one hundred, both inclusive, and also six hundred thousand dollars of principal of said bonds, which said several sums of interest, amounting to eight hundred and ninety-six thousand six hundred dollars and eighty-four cents, and the amount of principal of said bonds is found to be two millions seven hundred and ninety-four thousand dollars, be, and hereby is, confirmed.

And it is further ordered, adjudged, and decreed by the court that all and singular the mortgaged premises mentioned in the bill of complaint in this cause and hereinafter described, or so much thereof as may be sufficient to raise the amount due the complainants for principal and interest, and the costs in this cause, (and which be sold separately without material injury to the parties interested as hereinafter directed,) be sold at public auction, under the direction of the marshal for this district, unless the mortgagor, previous to such sale, pay into court the said sum of eight hundred and ninety-six thousand six hundred dollars and eighty-four cents, and interest thereon from this date, together with the costs in this cause to be taxed.

And it is further ordered that said sale be made at the post office
120 in the city of Milwaukee, within this district, and that said marshal give public notice of the time and place of such sale by advertisement published in some newspaper in the city of La Crosse, and in the city of New York, once in each week for three months previous to the day of sale, and that the complainants or the bondholders, or any of the parties to this cause, may become the purchaser thereof; and that the said marshal, after the confirmation of said sale by the court, execute a deed or deeds to the purchaser or purchasers of the mortgaged premises, and that the said marshal bring into court for distribution among the bondholders and other lien creditors the proceeds of said sale; and that the bonds secured by the mortgage described in this bill may be received in part payment of the proceeds of such sale, in the proportion as each bond at the principal thereof, for the amount thereof, according to this decree, (that is, the first nineteen hundred and ninety-one bonds at par, and the remainder at four hundred dollars on the thousand dollars,) bears to the amount of said sale.

And it is further ordered, adjudged, and decreed by the court that the defendant, and all persons claiming or to claim from or under them, be forever barred and foreclosed of and from all equity of redemption and claim of, in, and to said mortgaged premises, and every part and parcel thereof.

And it is further ordered, adjudged, and decreed by the court that the purchaser or purchasers of said mortgaged premises at such sale be let into possession thereof, to the extent allowed and granted by the said mortgage.

The description of the property authorized to be sold under and by virtue of

this decree, so far as the same can be ascertained from the mortgage above referred to, or from the bill of complaint in this cause, is as follows, viz:

All and singular the several tracts, pieces, or parcels of land which now are, or may hereafter be or constitute, the site of the roadway, turn-outs, engine-houses, workshops, depots, and other buildings, and all the other lands and real estate which now constitute, or may hereafter constitute or be, a part of the roads of said railroad company from Madison, by way of Portage City, to the St. Croix River or Lake, between townships twenty-five and thirty-one, and from Portage City to La Crosse; and also all and singular the superstructure of said road, whether now made or to be made
121 hereafter, and all the engine-houses, workshops, depots, and other buildings, and all the other improvements on or pertaining to said roads, whether now built and made or to built and made hereafter; and also all and singular the locomotive engines and other rolling stock, and all the other equipments of every kind and description, which have already been, or may hereafter be, procured for or used on said roads, or either of them, and all the materials, tools, implements, utensils, and other personal property, which have been, or may hereafter be, procured for or used in connection with said roads, or either of them; and also all and singular the rights, liberties, privileges, and franchises of said railroad company of every kind and description relating to said road.

Also "all and singular the lands granted or intended to be granted to said railroad company, under or by virtue of the act of Congress and the act of the legislature of Wisconsin hereinbefore mentioned, so far as the said lands pertain or are applicable to the construction of said roads from Madison, by way of Portage City, to the St. Croix River or Lake, estimated to be about one million of acres of land, together with all and singular the hereditaments and appurtenances belonging or in anywise appertaining to the lands and real estate hereby conveyed or intended to be conveyed. And it is hereby declared to be the intention of the parties to these presen s to convey and to vest in said parties of the second part all the property, real and personal, of said railroad company, to be acquired hereafter, as well as that which has already been acquired, together with all the rights, liberties, privileges, and franchises of said railroad company, in respect to the roads above mentioned, as fully and amply as the same might be conveyed if the said railroads had already been fully constructed and equipped, and the particular lands granted by the foregoing act of Congress and the legislature, so far as the same are applicable to the construction of said road from Madison to St. Croix River or Lake, had already been designated and conveyed to said railroad company."

With forty box cars, numbered 330, 332, 334, 336, 338, 340, 342, 344, 346, 348, 350, 352, 354, 556, 358, 360, 362, 364, 366, 368, 370, 372, 374, 376, 378, 380, 382, 384, 386, 388, 390, 392, 394, 396, 398, 400, 402, 404, 406, and 408, and such portion or share of rolling stock purchased and procured by the receiver, costing one hundred and forty-seven thousand nine hundred
122 and forty-two dollars and sixty-three cents, as the net revenues of the portion of road covered by this mortgage bears to the balance or other end of the road since the appointment of the receiver. The remaining rolling stock is subject to prior mortgages.

And it is further ordered by the court that the said described lands granted by the United States be first sold, and if the proceeds of the sale thereof shall be sufficient to pay and discharge the said sum of eight hundred and ninety-six thousand six hundred dollars and eighty-four cents, with interest from this date and costs, or if the said sum be released or satisfied or paid into court, further proceedings under this decree shall be then stayed. And if, at any time hereafter, there should be any default in the payment of any

interest due on said mortgage, or of the sum of two million seven hundred and ninety-four thousand dollars, the principal thereof, when the same becomes due and payable at the time mentioned in said bonds and mortgages, the court may, upon petition of the complainants, or the holders of the said bonds by a further order founded upon this decree, direct a sale of said mortgaged premises, or any part thereof, or of such part thereof as may not be previously sold under this decree, to be made under and in conformity to this decree as aforesaid, for the amount then so due, with the costs of such petition, and the subsequent proceedings thereon. And the same proceedings shall be had as often as a default shall be made.

A. G. MILLER.

Decree signed, recorded, and enrolled January 13, A. D. 1862.
J. M. MILLER, *Clerk.*

123 *Exhibit No.* 14.—*Marshal's report of sale of the western division.*

In the district court of the United States for the district of Wisconsin.

GREENE C. BRONSON, JAMES T. SOUTTER, AND SHEPERD KNAPP, trustees, complainants,
vs.
LA CROSSE AND MILWAUKEE RAILROAD COMPANY, J. ALBERT Helfenstein, trustee, Selah Chamberlain, Newcomb Cleveland, Edwin Townsend, Franklin J. Blair, Edmund R. Persons, Leman Graham, Daniel D. Scott, Avery Hill, A. V. Rudd, E. Bradford Greenleaf, John H. Tesch, Dewitt C. Freeman, Ephraim Mariner, Thomas Turton, John Sercomb, Sebastian Knetzger, Frederick Lind, Edward H. Brodhead, Joshua Hathaway, William Gemmell, Charles Quentin, August Sauthoff, Sebre Howard, Lawrence G. Graham, Donald G. Scott, the Milwaukee and Minnesota Railroad Company, Moses M. Davis, James Wolstenholme, Guy Tracy, Horace Galpin, Edward Livermore, William Crawshay, Henry G. Gilbert, John Hardy, George W. Berrian, George Strobel, G. R. Van Allen, James G. Fulton, Moses A. Hoppock, Lereno Gaylord, C. Lewis Zimmerman, Daniel Goodwin, Stephen A. Dodge, Charles F. Deitz, William Wood, Benjamin F. Dawson, James W. Wood, John Wells, Ruric Martin, R. J. Barton, D. M. Corbell, D. Farnsworth, Harvey Terry, James J. Day, W. Catlin, Bruce & Young, John M. Trift, Jonathan P. Hopper, D. S. Kingore, Noah Sturdevant, William Fessenden, John L. Southland, E. Haskett Derby, Frederick Levick, Charles Shephard,
124 C. P. Williams, Orville Oddie, John Pemberton, Niles Higgenbotham, George Ashley, William Gould, Nathan Marble, Jacob Van Vechten, John J. Vanderbilt, T. F. Bergen, G. S. Boardman, and John Nicholson, defendants.

In chancery.

I, Darius C. Jackson, marshal for the district of Wisconsin, hereby report that, in pursuance and by virtue of a decree made by the district court of the United States for the district of Wisconsin, on the thirteenth day of January, A. D. 1862, as directed in said decree, I gave notice of the time and place of sale by publication once in each week for three months, in the La Crosse Republican, a newspaper published in the city of La Crosse, and

in the Evening Post, a newspaper published in the city of New York, (a printed copy of said notices and the affidavits of publication are hereto annexed and referred to as a part of this report.) And I did at the time and place mentioned in said printed notice, to wit, on the 25th day of April, in the year 1863, at 2 o'clock p. m., at the post office, in the city of Milwaukee, then and there first offer for sale and sell at public auction the premises described in said decree as follows, to wit :

"All and singular the lands granted or intended to be granted to said La Crosse and Milwaukee Railroad Company under and by virtue of an act of Congress of the United States entitled 'An act granting public lands to the State of Wisconsin to aid in the construction of railroads in said State,' approved June 3, A. D 1856, and under or by virtue of an act of the legislature of the State of Wisconsin, approved Oct. 11, A. D. 1856, entitled 'An act to grant certain lands to the La Crosse and Milwaukee Railroad Company, and to execute the trust created by an act of Congress entitled, 'An act granting public lands to the State of Wisconsin to aid in the construction of railroads in said State," approved June 3, A. D. 1856, so far as the said lands pertain or are applicable to the construction of said road from Madison, by way of Portage City, to the St. Croix River or Lake, estimated to be about one million of acres of lands, together with all the hereditaments and appurtenances thereunto belonging or in anywise appertaining, situate, lying, and being in the State of Wisconsin, which were bid off by William Wallace Pratt and William H. White, for the sum of one hundred and twenty-five thousand dollars, ($125,000,) they being the highest and best bidder, and that being the highest and best bid made for the premises described

125 And I there offered for sale, and sold, in like manner, the balance of the premises and property described in said decree, as follows, to wit : "All and singular the several tracts, pieces, or parcels of land which constitute the site of the roadways, turn-outs, engine-houses, workshops, depots, and other buildings, and all the other lands and real estate which constitute part of the roads of said railroad company from Madison, by way of Portage City, to the St. Croix River or Lake, between townships 25 and 31, and from Portage City to La Crosse ; and also all and singular the superstructure of said roads, and all the engine-houses, workshops, depots, and other buildings, and all the other improvements on or pertaining to said roads ; and also all and singular the locomotive engines, and other rolling stock, and all the other equipments of every kind and description which have been procured for or used on said roads or either of them, and all the materials, tools, implements, utensils, and other personal property which have been procured for or used in connection with said roads or either of them ; and also and singular the rights, liberties, privileges, and franchises of said La Crosse and Milwaukee Railroad Company of every kind and description relating to said roads, (of said rolling stock forty box cars numbered respectively 330, 332, 334, 336, 338, 340, 342, 344, 346, 348, 350, 352, 354, 356, 358, 360, 362, 364, 366, 368, 370, 372, 374, 376, 378, 380, 382, 384, 386, 388, 390, 392, 394, 396, 398, 400, 402, 404, 406, and 408, and such proportion or share of rolling stock purchased and procured by the receiver, costing one hundred and forty-seven thousand nine hundred and forty-two dollars and sixty-three cents, as the net revenues of the portion of the road covered by the aforesaid mortgage bear to the balance or other end of said road, was sold free and clear of all lien incumbrance ; but the remainder of the above-mentioned rolling stock was sold subject to the lien of mortgages prior in date to the mortgage above mentioned, given by said La Crosse and Milwaukee Railroad Company,) together with the tools, rents, and income to be had or levied therefrom, and all corporate and other rights, franchises,

and privileges of the said company, of, in, and to, or concerning the same, being all the property, real or personal, described in the said mortgage, (except the lands therein mentioned, granted by Congress to the State of Wisconsin,) and all and singular the privileges, hereditaments, appurtenances to the same belonging or in anywise appertaining, situate, lying, and being in the State of Wisconsin, which was bid off by William
126 Wallace Pratt and William H. White, for the sum of two million six hundred and seventy-five thousand dollars, ($2,675,000,) they being the highest and best bidders, and that being the highest and best bid made for the premises last above described.

And I further report that said purchasers have complied with both of their said bids, and have paid to me the sum of two million eight hundred thousand dollars, as follows:

Said sum is $1,001,932 on each dollar of the principal of the bonds secured by the said mortgage, as fixed by the decree in this cause, said purchasers have paid twenty-seven hundred and eight thousand six hundred and twenty-three dollars and eight cents ($2,708,623 08) in bonds secured by said mortgages as follows: nineteen hundred and thirty-nine (1,939) of said bonds, numbered between 1 and 1991, inclusive, for one thousand dollars each, eighteen hundred and sixty-five (1,865) of said bonds for one thousand dollars each, numbered between 1992 and 3950, inclusive, and ninety-two bonds for five hundred dollars each, numbered between 1 and 100, inclusive, and ninety-one thousand three hundred and seventy-six dollars and twenty-two cents ($91,396 22) in cash, all of which amounts to $1,001,932 on the dollar of the principle of all the bonds outstanding and secured by said mortgage.

DARIUS C. JACKSON, *U. S. Marshal,*
By W. S. JACKSON, *Deputy.*

127 *Exhibit No.* 15.—*Confirmation of marshal's report of sale of western division.*

And afterwards, to wit, at a stated term of the district court of the United States of America for the district of Wisconsin, begun and held according to law, at the city of Milwaukee, in said district of Wisconsin, on the first Monday (being the fifth day) of January, A. D. 1863. Present: The Honorable Andrew G. Miller, judge of said court, presiding.

On the twelfth day of said term, to wit, on the fifth day of May, A. D. 1863, the following proceedings were had, to wit:

GREENE C. BRONSON, JAMES T. SOUTTER, AND SHEPERD KNAPP, trustees,
vs.
LA CROSSE AND MILWAUKEE RAILROAD COMPANY, J. ALBERT HELFENSTEIN, trustee, *et als.*
} In equity.

This day came the parties, by their counsel, and the argument of the several exceptions to the sale of the mortgaged premises by the marshal being concluded, it is ordered by the court that said exceptions be, and hereby are, overruled.

And it is further ordered and decreed by the court that the said sale, so as aforesaid made, be, and hereby is, confirmed, and that the marshal make a deed to the purchasers.

128 *Exhibit No.* 16.—*Appointment of receiver in western division foreclosure cause.*

UNITED STATES OF AMERICA,
District of Wisconsin, ss:

At a special term of the district court of the United States of America for the district of Wisconsin, begun and held according to law, at the city of Milwaukee, in said district of Wisconsin, on the second Monday (being the ninth day) of April, A. D. 1860. Present: The Honorable Andrew G. Miller, judge of said court, presiding.

On the fourteenth day of the said term, to wit, on the eighteenth day of May, A. D. 1860, the following proceedings were had, to wit:

GREENE C. BRONSON, JAMES T. SOUTTER, AND SHEPERD KNAPP, trustees,
vs.
LA CROSSE AND MILWAUKEE RAILROAD COMPANY, J. ALBERT HELFENSTEIN, trustee, *et als.*
} In equity.

The rule and motion of the complainants for the appointment of a receiver in this cause having been argued by Mr. Potter for the complainants, and by Mr. Lynde and Mr. Emmons for the defendant, Chamberlain, and submitted, on consideration thereof, it was ordered and decreed that this court doth hereby order and adjudge that the said complainants, or such one of them as they may select, be, and he or they are hereby, appointed receiver, as hereinafter mentioned, and be at once put into possession of the
129 mortgaged property; but in case said complainants, or either of them, decline to act as such receiver, then, on filing such refusal, signed by them or their counsel, it is hereby further ordered that Hans Crocker be, and he hereby is, appointed receiver, (in their stead,) of all and singular the railroad from Madison, by way of Portage City, to St. Croix River or Lake, and from Portage City to La Crosse, mentioned in the bill of complaint, with all and singular the furniture, fixtures, and appurtenances, engine-houses, workshops, depots, and other buildings and improvements, engines, cars, rolling stock, materials, equipments, tools, implements, utensils, and all and singular the personal property, rights, liberties, privileges, and franchises of the said railroad company relating to said road, or which have been procured for or used in connection therewith, or either of them, and all the other property, rights and effects, franchises, and interest mentioned in the said deed of trust to the complainants which this action is brought to enforce.

And it is further ordered that the said trustees, or such one of them as may accept, and if not, then that the said Hans Crocker, before entering on his duties as such receiver, shall give a bond, with sureties, to be approved by the judge of this court, in the penal sum of fifty thousand dollars, conditioned that they or he will duly manage and conduct said railroad and mortgaged property, and for what he shall receive shall duly file inventories, and also file, under oath, every month, accounts of his receipts and disbursements, in accordance with the rules and practice and direction of this court.

And it is further ordered that the defendants, and particularly the defendant Selah Chamberlain, deliver over to the said trustees, or such of them as they shall elect to act as receiver, and in case they decline to so act, then to the said Hans Crocker, as such receiver, all and singular the said railroad from Madison to Portage City and from Portage City to La Crosse, and all other the real estate and premises in said deed of trust to complainants mentioned, and all and singular the rolling stock, locomotives, cars, machinery, tools, fixtures, money, furniture, and appurtenances, and other personal property which belonged to the La Crosse and Milwaukee Railroad Compa-

ny on the 31st day of December, 1856, or at any time thereafter, which may have been procured for or used in connection with said mortgaged premises, or any thereof, which may have come to the hands of the said defendants respectively, or over which they have control; and that such receiver
130 take possession thereof, and take directly, or by such agent as may be for that purpose by such receiver duly appointed, the care, possession, management, direction, and control of all such property, and all the income to be had and received from the running, possession, and operation and use of the said railroad and property in anywise, and out of the same pay the expenses of the said receivership and this application, and the costs and expenses of operating and maintaining or preserving and keeping said railroad and other property and premises to be received by him as aforesaid, and then hold the balance of such money and receipts subject to the further order and direction of this court.

And it is further ordered that the said receiver, and any other party in interest in this suit, have leave, from time to time, to apply to this court for such further directions in respect to such property, and the management and proceeds thereof, as may be just and may be required.

June 7, 1860.—This day came the complainants, by their counsel, Mr. Cary, and declined to act as receiver, by virtue of the order of this court, made on the 18th day last, as by their declination in writing filed. And the official bond of Hans Crocker, as receiver, approved and filed.

131 *Exhibit No.* 17.—*Appointment of receiver in the Howard case.*

SEBRE HOWARD
vs.
THE LA CROSSE AND MILWAUKEE RAILROAD COMPANY AND SELAH CHAMBERLAIN.

June 9, 1860.—This day came the parties by their counsel, and the rule of the complainant for an injunction and for the appointment of a receiver having been argued on the bill, records, and affidavits submitted, on consideration whereof it is ordered by the court that an injunction be, and hereby is, allowed, according to the prayer of the bill, until the further order of this court. And this day the motion and rule of the complainant for the appointment of a receiver came on to be heard and was argued by Mr. Hubbell and Mr. Carpenter for the complainant, and by Mr. Emmons for the defendant, Selah Chamberlain, the defendant, the La Crosse and Milwaukee Railroad Company, not appearing. On consideration whereof it is ordered by the court that Hans Crocker be, and he is hereby, appointed receiver of all the railroad of the said La Crosse and Milwaukee Railroad Company, being all the line of railroad extending from the city of Milwaukee to the city of La Crosse, in the State of Wisconsin, together with all the depots, depot buildings, tracks, side tracks, engine-houses, buildings, fixtures, fences, locomotives, engines, cars, furniture, tools, rolling stock, rights, privileges, and franchises, and all other personal and real property belonging to the said railroad company, and belonging to, or used or connected with, said line of said road, (subject nevertheless to a previous order of court appointing him, the said Hans Crocker, to be the receiver for the western portion of said road from Portage City to La Crosse,) and be at once put into
132 possession of the same and every part and parcel thereof. And it is further ordered that the said Hans Crocker, before entering upon his duties as such receiver, shall give a bond, with sureties, to be approved by the judge of this court, in the penal sum of fifty thousand dollars, conditioned that he will duly manage and conduct said railroad and property, and for what he shall receive shall duly file inventories, and also file, under oath,

every month, accounts of his receipts and disbursements according to the rules and practice and directions of this court. And it is further ordered that the defendants, and particularly the defendant Selah Chamberlain, deliver over to the said Hans Crocker as such receiver, all and singular, the said railroad from Milwaukee to La Crosse, and all other the real estate and premises before mentioned, and all and singular the rolling stock, locomotives, cars, machinery, tools, fixtures, money, furniture and appurtenances, and other personal property which belongs or has been procured for or used in connection with said railroad or any part thereof, which may have come to the hands of the said defendants or over which they have control, and that such receiver take possession thereof, and take directly, or by such agent as may be for that purpose by such receiver duly appointed, the care, possession, management, direction, and control of all such property and all the income to be had and received from the running, possession, and operation or use of the said railroad and property in anywise, and out of the same pay the expenses of the said receivership, and the costs and expenses of operating and maintaining or preserving and keeping said railroad and other property and premises to be received by him as aforesaid, and then hold the balance of such money and receipts subject to the further order of this court. And it is further ordered that the said receiver and any other party in interest in this suit have leave, from time to time, to apply to this court for such further directions in respect to such property and the management and proceeds thereof as may be just and may be required.

133 *Exhibit No.* 18.—*Appointment of receiver in second mortgage case.*

GREEN C. BRONSON AND JAMES F. SOUTTER, trustees,
vs.
LA CROSSE AND MILWAUKEE R. R. Co. and others.

July 6, 1860.—This day came the complainants by their counsel, and on their motion it is ordered by the court that Hans Crocker be, and he is hereby, appointed receiver of all the railroad of the said the La Crosse and Milwaukee Railroad Company, being all the line of railroad extending from the city of Milwaukee to the city of La Crosse, in the State of Wisconsin, together with all the depots, depot buildings, tracks, side tracks, engine-houses, buildings, fixtures, fences, locomotives, engines, cars, furniture, tools, rolling stock, rights, privileges, and franchises, and all other personal and real property belonging to the said railroad company, and belonging to or used or connected with said line of said road, (subject, nevertheless, to a previous order of court appointing him, the said Hans Crocker, to be the receiver of the western portion of said road from Portage City to La Crosse,) and be at once put into possession of the same, and every part and parcel thereof.

And it is further ordered that the defendants, and particularly the defendant Selah Chamberlain, deliver over to the said Hans Crocker, as such receiver, all and singular the said railroad from Milwaukee to La Crosse, and all other the real estate and premises before mentioned, and all and singular the rolling stock, locomotives, cars, machinery, tools, fixtures, money, furniture, and appurtenances, and other personal property which belongs or has been procured for or used in connection with said railroad or any part thereof, which may have come to the hands of the said defendants, or over which they have control; and that such receiver take possession thereof, *and take possession thereof*, and take directly, or by such agent
134 as may be for that purpose by such receiver duly appointed, the care, possession, management, direction, and control of all such property,

and all the income to be had and received from the running, possession, and operation or use of the said railroad and property in anywise, and out of the same pay the expenses of the said receivership, and the costs and expenses of operating and maintaining or preserving and keeping said railroad and other property and premises to be received by him as aforesaid, and then hold the balance of such money and receipts subject to the further order of this court.

And it is further ordered that the said receiver and any other party in interest in this suit have leave, from time to time, to apply to this court for such further directions in respect to such property and the management and proceeds thereof as may be just and may be required.

Order appointing a receiver modified.

July 7, 1860.—This day came the parties by their counsel, and also came Hans Crocker, the receiver, and made his report, from which it appears, among other things, that there are mechanics' liens and mortgages upon the depot buildings and depot grounds of said road; that thirty-five miles of right of way remain to be secured and paid for; that one hundred and forty miles of fencing remain to be completed; that there is due for rolling stock purchased by S. Chamberlain while in possession of the road, and mortgaged by him to the vendor, $9,547 91; that the depot grounds are encumbered with taxes and tax deeds; and further, that there is an immediate necessity for the purchase of at least three locomotive engines and fifty freight box cars. Said report having been submitted by consent; and upon the consideration thereof it is ordered, adjudged, and decreed by the court that the order appointing said receiver be, and is hereby, modified, and the court doth now here order and decree in manner following:

That the said receiver shall have power to bring and maintain any action or actions necessary or proper in order to enable him to execute his
135 duties; which actions or suits may be brought in the name of the La Crosse and Milwaukee Railroad Company; and in like manner he may defend any action or suit affecting the interests of the said company, so far as may be necessary to protect the property and interests confided to his care, or as may be necessary and proper to enable him to discharge his duties as such receiver.

He shall also have power to compromise and settle all suits or actions that have been or may be brought against said company, so far as may be necessary to protect the property committed to his care, upon such terms and conditions as to him shall seem most advantageous to said railroad or to said company, or other parties interested therein. He shall also have power, and is hereby authorized, to compromise, settle, and discharge all lawful claims against said company or said road for right of way, liens upon depot grounds or buildings, taxes upon depot grounds, and special liens upon the rolling stock in use upon said road, so far as may be necessary to protect the property of said company. He shall also have power to arbitrate or compromise, on such terms as he shall deem most advantageous to the interests of the road, all claims for damages for detentions or injury to persons or property arising from running or operating said road. The net earnings of the road shall be applied as follows, as far as may be deemed necessary:

To the payment of such sum as shall hereafter become due the State of Wisconsin for license to operate said road by virtue of any law of the State.

To the payment of all sums due operatives and employees of the road, and for materials or supplies furnished said road which have accrued since the first day of April last; but the receiver shall be authorized to pay any proper expenses incurred in the operating or managing of said road pre-

vious to that date, provided the same shall not exceed the sum of one thousand dollars.

To the payment of such sums as may be necessary to acquire the title to the right of way and depot grounds now used and occupied by the road.

To the payment of all sums due or that may become due to connecting roads on freight or passenger account in the ordinary course of business.

To the payment of the amount due on three notes given by S. Chamberlain in the month of August, 1859, for part payment on the purchase of freight cars, and which are subject to a chattel mortgage to secure the payment of such notes.

To the payment of such expenses as may be incurred in fencing so
136 much of the line of road as the receiver may deem necessary.

The said receiver shall have power and authority to purchase such locomotives and freight cars as may be necessary for the business of the road, but not to exceed three locomotives and fifty house freight cars, and at a cost not exceeding fifty-four thousand dollars; and for such portion of the purchase-money of such engines and cars as the receiver shall not be able to pay at the time of the purchase or delivery thereof, he may execute to the vendor a chattel mortgage thereon, to secure the payment of such purchase-money in arrear.

The receiver, acting in pursuance of this or any former or of any subsequent order or decree hereinafter to be made, in good faith and with ordinary care and prudence, shall not be individually liable for any breach of contract entered into by him as such receiver, or for any injury to person or property of the parties or of third persons, or for the faults or negligence of his subordinates; and for his indemnity against or exoneration from any and all such liabilities, should any such occur, the property, money, and effects that shall at any time be in his hands, as such receiver, shall be bound, and may from time to time, as may be necessary, be applied in such manner as the court shall direct.

137 *Exhibit No.* 19.—*Reference to masters.*

GREEN C. BRONSON AND JAMES T. SOUTTER
vs.
LA CROSSE AND MILWAUKEE R. R. CO. *et al.*

March 11, 1861.—This day came the complainants, by their counsel, and the defendants, Selah Chamberlain, Sebre Howard, Lawrence G. Graham, Donald D. Scott, Ephraim Mariner, the Milwaukee and Minnesota Railroad Company, who answered by John S. Rockwell, and A. Fleming, by their several counsel, and the Milwaukee, Watertown, and Baraboo Valley Railroad Company, by its counsel. And on due consideration of the bill taken as confessed, as aforeaaid, and of the pleadings, proofs, and arguments of counsel of these parties, it is ordered by the court that reference be, and hereby is, made to Winfield Smith, a master, and to Jerome R. Brigham and Joshua Hathaway, special masters, to ascertain and report the amount of interest due and unpaid on the bonds and mortgage described in this bill, and the real amount of said bonds; and in computing said interest, they deduct therefrom the amount received by the complainants through Prentiss Dow, their agent, of net revenues of the road and property of the company covered by the mortgage; and for this purpose they shall state an account of receipts and disbursements, and require said Dow to produce his books and be examined under oath as to all things pertaining thereto; and they may take additional testimony to that on file.

And the said masters shall ascertain and report the amounts of the several

judgments of Newcomb Cleveland, Sebre Howard, and of Graham & Scott and whether lots sold under the execution issued on the judgment of Sebre Howard are or are not covered by this mortgage.

And it is further ordered, that the said masters report the amount of the several specific claims of Selah Chamberlain, and also an account of his receipts, set-offs, and credits, and of such as should be made to his claims, including his receipts of revenues of the whole road, without regard
138 to its divisions by the mortgages; and that they may examine the said Chamberlain under oath, and require him to produce his books; and they may also take additional testimony to that on file.

And it is further ordered by the court that the said masters ascertain and report the whole amount of rolling stock on the whole road, and that they specify the quantity thereof that is covered by and included in the first mortgage, and also in this mortgage, and in the mortgage of Greene B. Bronson, James T. Soutter, and Shepherd Knapp.

139 *Exhibit No. 20.—Masters' report in eastern division foreclosure cause.*

District court of the United States for the district of Wisconsin.

Greene C. Bronson and James T. Soutter, trustees, *vs.* The La Crosse and Milwaukee Railroad Company, the Milwaukee and Minnesota Railroad Company, Selah Chamberlain, Sebre Howard, *et als.*	In equity.

To the Hon A. G. Miller, judge:

In pursuance and by virtue of an order of reference made in this cause on the eleventh day of March, A. D. 1861, and on an order supplementary thereto, made on the twenty-first day of March, A. D. 1861, we, the undersigned, Winfield Smith, a master, and Jerome R. Brigham and Increase A. Lapham, special masters, of this court, do respectfully report:

That we have been attended by the counsel for the parties, and have taken proofs in regard to the matters referred by the said orders, in addition to that on file, which proofs are herewith returned, consisting of depositions and exhibits, the latter numbered from one to thirty-nine, inclusive. We
140 further report that we have passed over the line of the railroad of the said La Crosse and Milwaukee Railroad Company, and we have examined those portions thereof where any of the work done by the defendant, Selah Chamberlain, as stated in the pleadings and testimony in this cause, was performed. Previous to which we gave notice of our intended examination to the counsel for the defendant Chamberlain, and to the counsel for the defendants, Howard, Graham & Scott, and the Milwaukee and Minnesota Railroad Company, informing them that they, and engineers selected by them respectively, were at liberty to accompany us and assist in making such examination. We also endeavored, but without success, to procure the attendance and aid of Benjamin H. Edgerton, an engineer, whose testimony is among the depositions herewith returned.

We have ascertained and computed the amount of interest due and unpaid on the bonds and mortgage described in the bill of complaint in this cause, and the real amount of the said bonds.

The real amount of the principal sum payable upon the said bonds, being one thousand bonds of one thousand dollars each, allowed at fifty cents on a dollar, is five hundred thousand dollars..... $500,000 00

And the interest due and unpaid thereon is twenty-five thousand five hundred and ninety four dollars and sixteen cents..	$25, 594 16
Which appears as follows: The entire amount of such interest which has fallen due since the first day of March, A. D. 1859, when the last coupons were paid, is one hundred thousand dollars, being at the rate of eight per cent. per annum upon $500,000, the said principal sum, from that date to the date of this report.....	$100, 000 00
From which sum we have deducted the amount received by the complainants through Prentis Dow, their agent, of net revenues of the road and property covered by the mortgage, (adding interest upon advances).....	74, 405 84
Leaving due as stated Sept. 1st, 1861	25, 594 16

For that purpose we have stated an account of the receipts and disbursements of the said Dow, and have required him to produce his books, and be examined under oath, as to all things pertaining thereto; which exami-
141 nation, with the exhibits therein referred to, numbered from twelve to twenty-three, inclusive, and from twenty-five to twenty-seven, inclusive, are returned and filed herewith. The accounts of the complainants, so stated, embracing the real amount of the instalments of interest falling due to the date hereof, and the receipts and disbursements through the said Dow, omitting the items of disbursements charged by the said Dow in his accounts presented to us and returned among the said last-named exhibits, but not allowed by us, and also exhibiting the balance of interest due over such payments as aforesaid, and the mode in which the said balance is obtained, is herewith returned and filed, marked Schedule first.

We have also ascertained the amount of the judgment of Newcomb Cleveland, mentioned in the said order, and now equitably owned by the defendant, Selah Chamberlain The same was rendered on the seventh day of October, 1857, for

damages	$111, 727 71
Costs.....	544 15
And there was paid thereon under the order of this court, April 22d, 1861, in full of interest and costs to that date, the sum of.....	28, 801 92
The interest on the amount then due, at seven per cent., from that date to June 29th, 1861, is	1, 455 56
Adding principal.....	111, 727 71
The total due was.....	113, 183 27
At which date was paid	10, 000 00
Leaving due June 29th, 1861.....	103, 183 27
Upon which the interest to July 18th, 1861, at seven per cent., is	381 20
Making the amount then due.....	103, 564 47
There was paid at that date	20, 000 00
Leaving then due.....	83, 564 47
On which the interest to this date is.....	698 68
The amount due at the date hereof is.....	84, 263 15

Eighty-four thousand two hundred sixty-three dollars and fifteen
142 cents.

We have also ascertained the amount of a certain other judgment, rendered in favor of Newcomb Cleveland against the La Crosse and Milwaukee Railroad Company, in the circuit court for Milwaukee county, on the twentieth day of April, A. D. 1859. There is due thereon at the date hereof:

Damages and costs	$1, 525 71
Interest to 1st Sept., 1861	252 14
The amount due at this date is	1, 777 85

We have also ascertained the amount of a certain other judgment, rendered in favor of Newcomb Cleveland, against the said railroad company, in the said circuit court, on the twentieth day of April, A. D. 1859. There is due thereon at the date hereof:

Damages and costs	$3, 718 60
Interest to 1st Sept., 1861	614 60
The amount due at this date is	4, 332 20

We have also ascertained the amount of the judgments of the defendant, Sebre Howard, mentioned in his answer filed in this cause. The amount of his judgment rendered in the said circuit court is embraced in the judgment rendered in his favor in this court, on the twenty-eighth day of November, A. D. 1859, on which last-named judgment there is due at the date hereof:

Damages and costs	$16, 379 86
Interest to 1st Sept., 1861	2, 013 39
The amount due at this date	18, 393 25

We have ascertained the amounts of the judgments of the defendants, Graham & Scott, mentioned in their answer to this cause. The amounts of their judgments rendered in the said circuit court are embraced in the judgment rendered in their favor in this court, on the law side thereof, on the eleventh day of January, A. D. 1860, on which last-named judgment there is due at the date hereof:

Damages and costs	$44, 413 18
Interest to 1st Sept., 1861	5, 092 78
The amount due at this date is	49, 505 96

143 We have ascertained and determined that the lot sold under the execution issued on the said judgment of Sebre Howard, rendered in the said circuit court, are covered by the mortgage of the complainants described in the bill of complaint in this cause. The papers herewith filed, marked Schedule second, being certified copies of the sheriff's certificates of sale under the said execution, contain a list and description of the lots so sold.

We have inquired into and ascertained the amount of the several specific claims of the defendant, Selah Chamberlain, and have taken and stated an account of his receipts, set-offs, and credits, and of such as should be made to his claims, including his receipts of revenues of the whole road, without regard to its divisions by the mortgages. And we have examined the said Chamberlain under oath, and have required him to produce his books, which

he has accordingly done, and we have taken additional testimony to that on file. The account of the said Chamberlain, comprising the said claims, (exclusive of the judgment rendered in favor of Newcomb Cleveland, first above mentioned,) presented to us, is herewith returned, marked Schedule third. The papers marked Schedule fourth, herewith returned, contain his account with the said railroad company, as allowed and stated by us, showing the amount of his several specific claims against the said company, as allowed by us, omitting the last-mentioned judgment, and also the items disallowed by us, and showing also the amounts of his receipts, set-offs, and credits, and of such as should be made to his claims, including his receipts of revenues of the whole road, and showing the balance due to him, including interest, at the date of this report; which balance we have ascertained to be four hundred eighteen thousand six hundred sixteen dollars and seventy cents.

And we have made a separate statement, as part of said Schedule fourth, of the real and just amount due on the second day of October, A. D. 1857, on account of the items of indebtedness included in the judgment of Selah Chamberlain, rendered at that date, and mentioned in the pleadings in this cause; showing that the true amount of such items of indebtedness was at that date $568,975 77.

Of the several specific claims so allowed and stated in the said account is one, under date of October 1st, 1858, 144 for moneys paid by the said Chamberlain, on and before that date, in the construction of the depot building of the said company at La Crosse, to the amount of.....	$12,190 95	
On which interest to the date hereof, from that, at 7 per cent., is.....	2,489 00	
The amount due at this date is.....		14,679 95

Which sum is secured to the said Chamberlain, who holds the title to the said building and the ground on which it stands.

And another of the said claims so allowed under date of March 1st, 1859, is for moneys paid by the said Chamberlain to Jacob A. Hoover for a lot of land in the city of Milwaukee, crossed by the said railroad, and used for its purposes, to the amount of.....	$3,236 52	
On which interest to the date hereof, at 7 per cent., is.....	566 38	
The amount due at this date is.....		3,802 90

Which sum is likewise secured to the said Chamberlain, who holds the title to the said lot.

We have also ascertained the whole amount of rolling stock on the whole road. The amount thereof, at the cost price, was at the date of filing the bill of complaint in this cause five hundred sixty-nine thousand six hundred thirty-five dollars and seventy-eight cents. And an additional amount of fifty-three thousand six hundred dollars has been purchased since the filing of the bill of complaint, making the whole amount now on the road six hundred twenty-three thousand two hundred thirty-five dollars and seventy-eight cents, ($623,235 78.)

And we have ascertained, and do further report, that of the said rolling stock, forty box-cars, amounting, at the cost price thereof, to thirty-one thousand nine hundred and seventy-nine dollars and sixty-four cents, ($31,979 64,) and numbered 330, 332, 334, 336, 338, 340, 342, 334, 346, 348,

350, 352, 354, 356, 358, 360, 362, 364, 366, 368, 370, 372, 374, 376, 378, 380, 382, 384, 386, 388, 390, 392, 394, 396, 398, 400, 402, 404, 406, and 408, are covered by and included in the mortgage of Greene C. Bronson, James T. Soutter, and Shepard Knapp, and no other. And all the remainder of the said rolling stock is covered by and included in the first mortgage upon the said railroad, and in the complainant's mortgage specified in the bill of complaint.

145 In ascertaining the facts and amounts, and in making the computations hereinabove contained and referred to, we have been guided by the opinions and instructions of the court, communicated to us in connection with the said order of reference.

All which is respectfully submitted.

Dated Milwaukee, 1st September, 1861.

WINFIELD SMITH.
JEROME R. BRIGHAM.
I. A. LAPHAM.

146 *Exhibit No.* 21.—*Order on report of masters.*

GREENE C. BRONSON AND JAMES T. SOUTTER, trustees,
vs.
LA CROSSE AND MILWAUKEE R. R. Co. *et al.*

January 7, 1862.—This day came the parties, by their counsel, and on consideration of the exceptions of the parties to the report of the masters, and of the arguments of counsel, it is thereupon ordered by the court that all the several exceptions of complainants to said report be, and hereby are, overruled. And it is further ordered by the court that the exceptions filed by Henry Vallette to said report be, and hereby are, overruled.

And it is further ordered that the sixth and seventh exceptions of Selah Chamberlain to said report be, and hereby are, allowed, and that his tenth exception to said report be, and hereby is, overruled.

And it is further ordered by the court that the several remaining exceptions of the defendant Selah Chamberlain, and the several exceptions of the defendants Sebre Howard, Graham & Scott, and the Milwaukee and Minnesota Railroad Company, to said report be held by the court for further consideration.

And it is ordered by the court that the said defendants, Sebre Howard, Graham & Scott, the Milwaukee and Minnesota Railroad Company, and any other defendants who have liens subsequent to those claimed by Selah Chamberlain, may file a cross-bill against said Chamberlain, contesting the liens under the lease or assignment and judgment claimed by him in his answer. And if the said cross-bill is not filed by the first Monday of February next, it will be considered by the court as waived.

And the answer of Henry Vallette having been argued and submitted by his counsel, Mr. Palmer, it is ordered by the court that the said answer be, and hereby is, overruled.

And it is further ordered by the court that the report of the masters, allowing forty box cars to be covered by the land grant mortgage of

147 said company to Bronson, Soutter, and Knapp, be, and hereby is, confirmed; and that the said report be so modified that all the other rolling stock that was on said road when the receiver was appointed, except the said forty box cars, is covered by and included in the first mortgage of the said company from Milwaukee to Portage City; and that all the rolling stock on said road that has been purchased or procured since the court has had possession by its receiver be applied *pro rata*, in proportion to the revenues of the road, to the first said mortgage and the said land grant mortgage.

148 *Exhibit No. 22.—Decree in eastern division foreclosure cause.*

UNITED STATES OF AMERICA,
District of Wisconsin, ss:

At a stated term of the district court of the United States of America for the district of Wisconsin, begun and held according to law, at the city of Milwaukee, in said district of Wisconsin, on the first Monday (being the sixth day) of January, A. D. 1862. Present: The Honorable Andrew G. Miller, judge of said court, presiding.

On the sixth day of the said term, to wit, on the thirteenth day of January, A. D. 1862, the following proceedings were had, to wit:

GREENE C. BRONSON AND JAMES T. SOUTTER, trustees,
vs.
THE LA CROSSE AND MILWAUKEE RAILROAD COMPANY, The Milwaukee and Minnesota Railroad Company, Selah Chamberlain, Sebre Howard, Conrad Wellauer, Edward H. Brodhead, Newcomb Cleveland, William Gemmell, Joshua Hathaway, James Wolstenholme, Edwin C. Litchfield, Ebenezer Higgins, George R. Mowry, Henry K. Eastman, Henry L. Simonds, De Witt C. Freeman, E. Bradford Greenleaf, Frederick Lind, Sebastian Knetzger, Lawrence G. Graham, Donald D. Scott, Thomas Turton, John Sercomb, Ephraim
149 Mariner, Avery Hill, A. V. Rudd, Franklin J. Blair, Edmund R. Persons, Philip S. Justice, Elkanah Cobb, John V. Bean, Philip Wilson, J. Howard Mitchell, Edwin Townsend, the Mercantile Bank of Hartford, Conn., August Lauthoff, Charles Quentin, John H. Tesch, Byron Kilbourn, Nathaniel S. Bouton, the Juneau Bank, the Milwaukee, Watertown, and Baraboo Valley Railroad Company, Cicero Comstock, George W. Chapman, Moses M. Davis, Charles Howard, and Henry Valette. } In equity.

This day this cause came on to be finally heard upon the bill taken as confessed against the defendants, the La Crosse and Milwaukee Railroad Company, the Milwaukee and Minnesota Railroad Company, Edward H. Brodhead, Joshua Hathaway, D. C. Freeman, E. Bradford Greenleaf, Thomas Turton, John Sercomb, Avery Hill, A. V. Rudd, F. J. Blair, E. R. Persons, E. Townsend, Charles Quentin, John H. Tesch, Byron Kilbourn, the Juneau Bank, Cicero Comstock, George W. Chapman, and Moses M. Davis, for their having failed to plead, answer, or demur thereto, and upon the bill and the answers of the defendants, Selah Chamberlain, Sebre Howard, Lawrence G. Graham, Donald D. Scott, A. Fleming, and John S. Rockwell, in the name of the Milwaukee and Minnesota Railroad Company, the Milwaukee, Watertown, and Baraboo Valley Railroad Company, Edwin C. Litchfield and Ephraim Mariner, and the replication thereto, and the pleadings and proofs and upon the report of the masters herein filed, and was argued by counsel; and thereupon, upon consideration thereof, it was ordered, adjudged, and decreed by the court as follows, to wit: That the report of Winfield Smith, Jerome R. Brigham, and Increase A. Lapham, masters appointed by this court, wherein the sum of sixty-five thousand two hundred and sixty dollars and five cents appears to be due to the said complainants at the date of said report, upon the bonds and mortgage in said bill mentioned, for inter-

est, and five hundred thousand dollars for the principal of said bonds, be, and is hereby, confirmed.

It is therefore further ordered, adjudged, and decreed, and this court doth hereby order, adjudge, and decree, that all and singular the mortgaged premises mentioned in the bill of complainant in this cause and hereinafter described, or so much thereof as may be sufficient to raise the amount
150 owing to the complainants for the several bondholders for principal, interest, and costs in this cause, be sold at public auction, under the direction of the marshal for this district, unless said mortgagor, the La Crosse and Milwaukee Railroad Company, or some one on its behalf, previous to such sale, shall pay the said sum of sixty five thousand two hundred and sixty dollars and five cents and interest thereon from this date, together with the costs in this cause to be taxed.

And it is further ordered that said sale be made at the post office in the city of Milwaukee, within this district, where said premises are situated; and that said marshal give public notice of the time and place of such sale by advertisement published in some newspaper printed in said city and in the city of New York, at least once in each week, for three months previous to the day of sale; and that said complainants, or any of the parties to this cause, may become the purchaser thereof; and that said marshal execute a deed or deeds to the said purchaser or purchasers of the mortgaged premises; and that said marshal pay to said complainants or their solicitors, out of the proceeds of such sale, their costs in this cause to be taxed, and that he bring the moneys arising from such sale into court for the several bondholders without delay, to abide the further order of the court.

And it is further ordered by the court that the bonds included in the mortgage may be received in payment of said purchase, at the rate of fifty cents on the dollar, in proportion that each bears to the amount of the sale.

And it is further ordered, adjudged, and decreed that the defendants, and all persons claiming or to claim from or under them, be forever barred and foreclosed of and from all equity of redemption and claim of, in, and to said mortgaged premises, and every part and parcel thereof.

And it is further ordered and decreed that the purchaser or purchasers of said mortgaged premises at such sale be let into such possession thereof as the said mortgage entitles them to, and that any of the parties to this cause who may be in possession of said premises, or any part thereof, and any person who, since the commencement of this cause, has come into possession under them or either of them, deliver possession thereof to such purchaser or purchasers, on production of the deed of said premises and a certified copy of the order confirming the report of sale in this cause.
151 And it is further ordered and decreed by the court that upon the payment into court of the said sum of sixty-five thousand two hundred and sixty dollars and five cents, with interest from this date, and the costs taxed, and such interest as may become payable on the bonds in the mean time, further proceedings under this decree shall then be stayed. And if at any time hereafter there should be any default in the payment of any interest due on said mortgage, or of the sum of five hundred thousand dollars, the principal thereof, when the same becomes due and payable at the times mentioned in the said bonds and mortgage, the court may, upon petition of the complainants or the holders of said bonds, by a further order founded upon this decree, direct a sale of said mortgaged premises to be made under and in conformity to this decree as aforesaid, for the amount then so due, with the costs of such petition and the subsequent proceeding thereon, and the same proceedings shall be had as often as a default shall be made.

The description of the property authorized to be sold under and by virtue of this decree, so far as the same can be ascertained from the mortgage

above referred to or from the bill of complainant in this cause, is as follows, viz:

"All and singular the railroad of said company, commencing in the city of Milwaukee and running thence to Portage City, a distance of ninety-five miles, which road has been constructed and is now in full operation; and also the railroad of said company (as well that part which has been constructed as that part which remains to be constructed,) from Watertown, by the way of Columbus, to Midland, (where it connects with the main line of the railroad of said company,) a distance of forty miles, one half of which last-mentioned road, being the part between Watertown and Columbus, has been constructed and is now in full operation, including all and singular the several tracts, pieces, or parcels of land which now are, or may hereafter be or constitute, the site of the roadways, turn-outs, engine-houses, workshops, depots, and other buildings, and all the other land and real estate which now constitute or may hereafter constitute or be a part of or appertain to said railroads, or either of them. And also all and singular the superstructure of said railroads, whether now made or to be made hereafter, and all the engine-houses, workshops, depots, and other buildings, and all the other improvements on or appertaining to said railroads, or either of them, whether now built or made, or to be built and made hereafter.

152 And also all and singular the locomotive engines and other rolling stock, and all the other equipments of every kind and description which have already been or may hereafter be procured for or used on said railroads or either of them; and all the materials, tools, implements, and utensils, and other personal property which have been or may hereafter be procured for or used in connection with said railroads or either of them.

And also all and singular the rights, liberties, privileges, and franchises of said railroad company, so far as they relate to said railroads, from Milwaukee to Portage City, and from Watertown, by the way of Columbus, to Midland, aforesaid.

And it is hereby declared to be the intention of the parties to these presents to convey to and vest in said parties of the second part all the property, real and personal, of said railroad company, to be acquired hereafter, as well as that which has already been acquired, together with all the rights, liberties, privileges, and franchises of said railroad company in respect to said railroads from Milwaukee to Portage City, and from Watertown, by the way of Columbus, to Midland, as fully and amply as the same might be conveyed if said railroads had already been fully constructed and equipped. Said railroads from Milwaukee to Portage City is subject to a first mortgage on the same of ten thousand dollars per mile, amounting in the aggregate to nine hundred and fifty thousand dollars; the first eighteen miles of said road from Milwaukee, westward, is subject to a second mortgage of one hundred and fourteen thousand dollars; and the next forty miles of said road, westward of the eighteen miles, is subject to a second mortgage of two hundred thousand dollars.

But it is further ordered that the marshal do not sell all that part of said mortgaged premises as are embraced in the description, and relating to the railroad from Watertown, by way of Columbus, to Midland aforesaid, unless the sale thereof should in the opinion of the court, be necessary and be required for the payment of the amount of the bonds and mortgage mentioned in this bill as settled by this decree, together with the previous liens on the premises described in said mortgage.

And it is further ordered by the court that the sale of the premises described in the said mortgage and in this bill as the railroad and appurtenances from the city of Milwaukee to Portage City, be made subject to the mortgages and liens mentioned therein.

153 And it is further ordered by the court that the sale of said mortgaged premises be made irrespective of and without regard to any claim or interest of the defendant, Ephraim Mariner, to the same or any part thereof.

A. G. MILLER.

Decree signed, recorded, and enrolled January 15, 1862.

J. M. MILLER, *Clerk.*

154 *Exhibit No.* 23.

UNITED STATES OF AMERICA, *ss:*

[SEAL.] The President of the United States of America to the honoroble the judges of the circuit court of the United States for the district of Wisconsin, greeting:

Whereas lately, in the district court of the United States for the district of Wisconsin, in a cause between Greene C. Bronson and James T. Soutter, trustees, complainants, and the La Crosse and Milwaukee Railroad Company, the Milwaukee and Minnesota Railroad Company, Selah Chamberlain, Sebre Howard, Conrad Wellauer, Edward H. Brodhead, Newcomb Cleveland, William Gemmell, Joshua Hathaway, James Wolstenholme, Edwin C. Litchfield, Ebenezer Higgins, George R. Mowry, Henry K. Eastman, Henry L. Simmonds, De Witt C. Freeman, E. Bradford Greenleaf, Frederick Lind, Sebastian Knetzger, Lawrence G. Graham, Donald D. Scott, Thomas Turton, John Sercomb, Ephraim Mariner, Avery Hill, A. V. Rudd, Franklin J. Blair, Edmund R. Persons, Philip S. Justice, Elkanah Cobb, John V. Bean, Philip Wilson, J. Howard Mitchell, Edwin Townsend, the Mercantile Bank of Hartford, Con't, August Sauthoff, Charles Quentin, John H. Tesch, Byron Kilbourn, Nathaniel S. Bouton, the Juneau Bank, the Milwaukee,
155 Watertown and Baraboo Valley Railroad Company, Cicero Comstock, George W. Chapman, Moses M. Davis, and Charles Howard and Henry Vallette, respondents; the decree of the said district court was in the following words, viz:

It was ordered, adjudged, and decreed by the court as follows: That the report of Winfield Smith, Jerome R. Brigham, and Increase A. Lapham, master appointed by this court, wherein the sum of sixty-five thousand two hundred and sixty dollars and five cents appears to be due to the said complainants at the date of said report upon the bonds and mortgage in said bill mentioned, for interest, and five hundred thousand dollars for principal of said bonds, be, and is hereby, confirmed.

It is therefore further ordered, adjudged, and decreed, and this court doth hereby order, adjudge, and decree, that all and singular the mortgaged premises mentioned in the bill of complaint in this cause and hereinafter described, or so much thereof as may be sufficient to raise the amount
156 owing to the complainants for the several bondholders for principal, interest, and costs in this cause, be sold at public auction under the direction of the marshal of this district, unless said mortgagor, the La Crosse and Milwaukee Railroad Company, or some one on its behalf, previous to such sale, shall pay the said sum of sixty-five thousand two hundred and sixty dollars and five cents, and interest thereon from this date, together with the costs in this cause to be taxed.

And it is further ordered that said sale be made at the post office in the city of Milwaukee, within this district, where said premises are situated; and that said marshal give public notice of the time and place of such sale by advertisement published in some newspaper printed in said city, and in

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the city of New York, at least once in each week, for three months previous to the day of sale; and that said complainants, or any of the parties to this cause, may become the purchaser thereof; and that said marshal execute a deed or deeds to the said purchaser or purchasers of the mortgaged premises; and that said marshal pay to said complainants or their solicitors, out of the proceeds of such sale, their costs in this cause to be taxed, and that he bring the moneys arising from such sale into court for the several bondholders without delay, to abide the further order of the court.

And it is further ordered by the court that the bonds included in the mortgage may be received in payment of said purchase, at the rate of fifty cents on the dollar, in proportion that each bears to the amount of the sale.

And it is further ordered, adjudged, and decreed that the defendants, and all persons claiming or to claim from or under them, be forever barred and foreclosed of and from all equity of redemption and claim of, in, and to said mortgaged premises, and every part and parcel thereof.

And it is further ordered and decreed that the purchaser or purchasers of said mortgaged premises at such sale be let into such possession thereof as the said mortgage entitles them to, and that any of the parties to this cause who may be in possession of said premises, or any part thereof, and any person who since the commencement of this cause has come into possession under them, or either of them, deliver possession thereof to such purchaser or purchasers, on production of the deed of said premises and a certified copy of the order confirming the report of sale in this cause.

157 And it is further ordered and decreed by the court that upon the payment into court of the said sum of sixty-five thousand two hundred and sixty dollars and five cents, with interest from this date, and the costs taxed, and such interest as may become payable on the bonds in the mean time, further proceedings under this decree shall then be stayed. And if at any time hereafter there should be any default in the payment of any interest due on said mortgage, or of the sum of five hundred thousand dollars, the principal thereof, when the same becomes due and payable, at the times mentioned in the said bonds and mortgage, the court may, upon petition of the complainants or the holders of said bonds, by a further order founded upon this decree, direct a sale of said mortgaged premises, to be made under and in conformity to this decree as aforesaid, for the amount then so due, with the costs of such petition and the subsequent proceeding thereon; and the same proceedings shall be had as often as a default shall be made.

The description of the property authorized to be sold under and by virtue of this decree, so far as the same can be ascertained from the mortgage above referred to, or from the bill of complainant in this cause, is as follows, viz:

All and singular the railroad of said company, commencing in the city of Milwaukee and running thence to Portage City, a distance of ninety-five miles, which road has been constructed and is now in full operation; and also the railroad of said company (as well that part which has been constructed as that part which remains to be constructed) from Watertown, by the way of Columbus, to Midland, (where it connects with the main line of the railroad of said company,) a distance of forty miles, one half of which last-mentioned road, being the part between Watertown and Columbus, has been constructed and is now in full operation, including all and singular the several tracts, pieces, or parcels of land which now are, or may hereafter be or constitute the site of the roadways, turnouts, engine-houses, workshops, depots, and other buildings, and all the other land and real estate which now constitute or may hereafter constitute or be a part of or appertain to said railroads, or either of them. And also all and singular

the superstructure of said railroads, whether now made or to be made hereafter, and all the engine-houses, workshops, depots, and other buildings, and all the other improvements on or appertaining to said railroads, or either of them, whether now built or made or to be built and made hereafter.

158 And also all and singular the locomotive engines and other rolling stock, and all the other equipments of every kind and description which have already been or may hereafter be procured for or used on said railroads, or either of them; and all the materials, tools, implements, and utensils, and other personal property, which have been or may hereafter be procured for or used in connection with said railroads, or either of them.

And also all and singular the rights, liberties, privileges, and franchises of said railroad company, so far as they relate to said railroads, from Milwaukee to Portage City, and from Watertown, by the way of Columbus, to Midland aforesaid.

And it is hereby declared to be the intention of the parties to these presents to convey to and vest in said parties of the second part all the property, real and personal, of said railroad company, to be acquired hereafter as well as that which has already been acquired, together with all the rights, liberties, privileges, and franchises of said railroad company in respect to said railroads from Milwaukee to Portage City and from Watertown, by the way of Columbus, to Midland, as fully and amply as the same might be conveyed if said railroads had already been fully constructed and equipped. Said railroad from Milwaukee to Portage City is subject to a first mortgage on the same of ten thousand dollars per mile, amounting in the aggregate to nine hundred and fifty thousand dollars; the first eighteen miles of said road from Milwaukee westward is subject to a second mortgage of one hundred and fourteen thousand dollars; and the next forty miles of said road westward of the eighteen miles is subject to a second mortgage of two hundred thousand dollars.

But it is further ordered that the marshal do not sell all that part of said mortgaged premises as are embraced in the description, and relating to the railroad from Watertown, by way of Columbus, to Midland aforesaid, unless the sale thereof should, in the opinion of the court, be necessary, and be required for the payment of the amount of the bonds and mortgage mentioned in this bill as settled by this decree, together with the previous liens on the premises described in said mortgage.

And it is further ordered by the court that the sale of the premises described in the said mortgage and in this bill as the railroad and appurtenances from the city of Milwaukee to Portage City be made subject to the mortgages and liens mentioned therein.

159 And it is further ordered by the court that the sale of said mortgaged premises be made irrespective of and without regard to any claim or interest of the defendant, Ephraim Mariner, to the same or any part thereof.

160 As by the inspection of the transcript of the record of the said district court, which was brought into the Supreme Court of the United States by virtue of an appeal, agreeably to the act of Congress in such case made and provided, fully and at large appears.

And whereas in the present term of December, in the year of our Lord one thousand eight hundred and sixty-three, the said cause came on to be heard before the said Supreme Court on the said transcript of the record, and was argued by counsel; on consideration whereof, it is the opinion of this court that the decree of the district court reducing the indebtedness of the La Crosse and Milwaukee Railroad Company to the bondholders is erroneous, and that the decision should have been for the full amount of

one million of dollars and interest. It is therefore now here ordered, adjudged, and decreed by this court that the decree of the said district court in this cause be, and the same is hereby, reversed, with costs; and that the said complainants, Greene C. Bronson and James T. Soutter, trustees, &c., recover against the said respondents, the La Crosse and Milwaukee Railroad Company *et al.*, two hundred and sixty-one dollars and seventy-one cents, for their costs herein expended, and have execution therefor. And it is further ordered, that this cause be, and the same is hereby, remanded to the circuit court of the United States for the district of Wisconsin, with directions to enter a decree for all the interest due and secured by the mortgage, with costs; that the court ascertain the amount of moneys in the hands of the receiver or receivers, from the earnings of the road covered by the mortgage, which may be applicable to the discharge of the interest, and apply it to the same; and that if the moneys thus applied is not sufficient to discharge the interest due on the first day of March, 1864, then to ascertain the balance remaining due at that date; and in case such balance is not paid within one year from the date of the order of the court ascertaining it, then an order shall be entered directing a sale of the mortgage premises, under the direction of the court; and on bringing the proceeds into court they shall be applied to the payment of the balance of interest; and if they exceed such balance, shall be applied to the future accruing interest down to the sale; and, if they exceed that, to the principal of the bonds, in case the bondholders assent, or, pro rata, to those who may assent; and any remaining balance of the proceeds to be invested under the direction of the court for the payment of future accruing interest and, ultimately, the principal. And, further, that in case the interest upon the bonds is paid without a sale, the decree shall remain as security for subsequent accruing interest, and, ultimately, for the principal. And, further, that the court may pay out of moneys in the hands of the receiver, or out of the proceeds, the taxed costs of the trustees in the proceedings for the foreclosure of the mortgage not taxed and received from the defendants in these proceedings; and also such counsel fees in behalf of the trustees as the court, in its discretion, may seem right to allow.

23 Feb.

You, therefore, are hereby commanded that such execution and further proceedings be had in said cause, in conformity to the opinion and decree of this court, as according to right and justice and the laws of the United States ought to be had, the said appeal notwithstanding.

Witness the Honorable Roger B. Taney, chief justice of said Supreme Court, the first Monday of December, in the year of our Lord one thousand eight hundred and sixty-three.

Taxed by—

D. W. MIDDLETON,
Clerk of the Supreme Court of the United States.

Exhibit No. 24.—*Order June* 12, 1863, *in eastern division foreclosure cause, putting Milwaukee and St. Paul Railway Company in possession, and order of April* 28, 1864, *vacating the same.*

United States district court.

GREENE C. BRONSON AND JAMES T. SOUTTER
vs.
THE LA CROSSE & MILWAUKEE RAILROAD COMPANY and others.

June 12th, 1863.—A petition in writing of the Milwaukee & St. Paul Railway Company having been presented to the court and filed in the case

of Greene C. Bronson, James T. Soutter, and Shepherd Knapp, against the La Crosse and Milwaukee Railroad Co. and others, setting forth in substance
that in pursuance of a decree of this court in that case, the western
165 division of the La Crosse & Milwaukee railroad, between La Crosse and Portage City, has been sold, and that said sale was confirmed and perfected; and that said Milwaukee & St. Paul Railway Co. is a corporation organized under the laws of the State, as grantees under said sale, and praying to be allowed to operate the whole line of road between La Crosse and Milwaukee as a continuous road, as directed and authorized by the act incorporating the La Crosse & Milwaukee Railroad Co.; and the said petition having been argued by Messrs. Cary and Lynde in support thereof, and by Messrs. Hubbell and Carpenter on behalf of Charles Howard, a judgment creditor of the La Crosse & Milwaukee Railroad Co., who is prosecuting a judgment creditors' bill, and of the Milwaukee & Minnesota Railroad Co., in opposition thereto; and the court being satisfied that the policy of the State and the interests of the public and of the creditors of the La Crosse & Milwaukee Railroad Co. require that the court should not continue further to operate, by its receiver, any part of the said railroad between La Crosse & Milwaukee, but that the whole line of said road should be operated without interruption or embarrassment by a responsible corporation; and the court being satisfied that its possession and control by a receiver of the eastern division, between Portage City and Milwaukee, might affect the rights of the public, and embarrass the free and proper operation of the whole road as required by the original grant or charter, and also prejudice the interests of creditors of the La Crosse & Milwaukee Railroad Co.; and it being represented to the court that persons interested in the Milwaukee & St. Paul Railroad Co. own or control bonds included in the mortgage to these complainants, and the subject of this suit, to the amount of four hundred and seventy-eight thousand dollars, being nearly one-half of the whole amount ofsaid mortgage—

It is thereupon ordered by the court that the order appointing a receiver in the case be modified in the manner following, subject to any further or other order rescinding, altering, or modifying this order now here made that the receiver let the said Milwaukee & St. Paul Railway Co. into the possession of the eastern division of the La Crosse & Milwaukee railroad from Portage City to Milwauke, with the appurtenances and property and rolling stock thereto belonging; and that the said Milwaukee and St. Paul Railway Co., subject to the further order or orders of the said court, operate
said eastern division of said railroad in connection with the said
166 western division thereof, so that one continuous line of railroad between La Crosse and Milwaukee may be operated and conducted as directed in the original charter of the La Crosse and Milwaukee Railroad Co., without hindrance, interruption, or diversion, the same as if the whole line of road continued to be in one company in pursuance of said charter, and not otherwise.

And it is further ordered by the court that the said Milwaukee and St. Paul Railway Co. shall at all times allow and permit the receiver, or such other persons as may be at any time appointed for that purpose, to have daily access and examination of the records, books, papers, accounts, proceedings, receipts, and revenues, and also of the transactions of the said Milwaukee and St. Paul Railway Co., and of its board of directors, in relation to the business and operation of the whole line of road, and that the said Railway Co. shall, out of the revenues of said road, keep the said eastern division and all the rolling stock in good order, and defray all running and other necessary expenses, and at the end of every month deliver to the said receiver, or such other person as may be appointed, a full and detail-

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ed account of all revenues arising on the whole road, and of ail necessary disbursements out of the same, and pay over monthly to the receiver the proportion of the said eastern division of the net revenues of the said railroad; and that the said receiver make monthly returns as heretofore of his accounts into court, and disburse the moneys by him received from time to time in the payments of liens and debts of the said La Crosse and Milwaukee Railroad Co., according to their priorities and equities.

And it is further ordered by the court that before the said Milwakuee and St. Paul Railway Co. be permitted to have possession under this order, the said company, by its constituted officers, shall enter into bond to the United States for the use and benefit of all interested, with sureties to be approved by the court, in the penalty of one hundred thousand dollars, conditioned that the said company will faithfully comply with this order of court this day made, and any subsequent orders relating to the operation and management of said railroad between La Crosse and Milwaukee, and will keep said road and the rolling stock and property in good order, and shall manage and conduct the same to the best advantage of the public and the creditors of the La Crosse & Milwaukee Railroad Co., and shall make monthly returns and pay over the net revenues of said road, according to this order.

167 *Exhibit No.* 25.—*Order vacating order of June 12th,* 1863.

GREENE C. BRONSON AND JAMES T. SOUTTER
vs.
THE LA CROSSE & MILWAUKEE R. R. Co. *et al.*

April 28, 1864.—This day ordered by the court that the order of the 12th June, 1863, modifying the order appointing the receiver, whereby the Milwaukee and St. Paul Railway Company were placed in possession of the eastern division of the road, be, and the same is hereby, rescinded, and that the Milwaukee and St. Paul Railway Company return to the receiver the said road and appurtenances and rolling stock received under said order, and all property relating to said eastern division.

168 *Exhibit No.* 26.

JAMES T. SOUTTER, surviving trustee,
vs.
THE LA CROSSE & MILWAUKEE RAILROAD COMPANY *et als.*

U. S. circuit court, State of Wisconsin.

To the judges of the circuit court of the United States of America for the district of Wisconsin:

I herewith submit my report as receiver of the La Crosse and Milwaukee railroad, showing my receipts and disbursements for the month of May, 1864.

HANS CROCKER, *Receiver.*

Balance cash on hand, April 30, 1864		$103,947 74
Receipts.—Freight earnings refunded		31 64
Foreign ticket balances		10 03
Exchange account balance		422 65
Disbursements.—Vouchers for cattle killed, &c....	$177 00	
Right of way, east division	400 00	
Legal expenses	15 00	

1st mortgage bond coupons	$33,105 88	
Milwaukee City do	597 10	
	34,294 98	
Balance cash on hand, May 31, 1864	70,117 08	
	104,412 06	$104,412 06

STATE OF WISCONSIN,
Milwaukee County, ss:

Hans Crocker being duly sworn, deposeth and says that the foregoing is a true and accurate statement of his receipts and disbursements, as receiver of the La Crosse and Milwaukee railroads for the month of May, 1864, according to his best knowledge, information, and belief.

HANS CROCKER.

Subscribed and sworn to before me, this 20th day of June, A. D. 1864.

W. L. HINSDALE,
Notary Public, Mil. Co., Wis.

169 *Schedule "A."—Petition of Milwaukee and St. Paul Railway Company for possession of whole road, and order of court May 7, 1863, for joint occupancy.*

UNITED STATES OF AMERICA,
District of Wisconsin, ss:

At a stated term of the district court of the United States of America for the district of Wisconsin, begun and held according to law, at the city of Milwaukee, in said district of Wisconsin, on the first Monday (being the fifth day) of January, A. D. 1863.

Present: The Honorable Andrew G. Miller, judge of said court, presiding.

On the fourteenth day of the said term, to wit, on the seventh day of May, A. D. 1863, the following proceedings were had, to wit:

GREENE C. BRONSON, JAMES T. SOUTTER, AND SHEPERD KNAPP, trustees,
vs.
LA CROSSE AND MILWAUKEE RAILROAD COMPANY *et als.*
} In equity.

This day came Mr. Carey, on behalf of the Milwaukee and St. Paul
170 Railway Company, and presented to the court its petition, in writing, as herein filed, "that it is a corporation duly organized by William Wallace Pratt and William H. White, the purchasers of the La Crosse and Milwaukee railroad and its appurtenances, at the marshal's sale, under the decree of this court in this cause, by virtue and in pursuance of chapter seventy-nine of the Revised Statutes of the State of Wisconsin concerning railroads.

That in pursuance of said sale and the confirmation thereof, by this honorable court, Darius C. Jackson, the said marshal of the United States for the district of Wisconsin, on the fifth day of May instant, executed and delivered to said William Wallace Pratt and said William H. White a deed of said mortgaged premises.

That immediately thereafter, said purchasers, William Wallace Pratt and William H. White, organized your petitioner as a corporation, under and by

virtue of the provisions of said chapter seventy-nine of the Revised Statutes of Wisconsin, concerning railroads, and on the said fifth day of May instant, filed their articles of association in the office of the secretary of state of the State of Wisconsin, a certified copy of which said articles of association are herewith shown to this court, and to which your petitioner prays leave to refer.

That afterwards, and on the 6th day of May instant, the said William Wallace Pratt and William H. White, under their hands and seals, executed and delivered to your petitioner, in due form of law, a deed of all and singular the said mortgaged premises aforesaid conveyed to them by the said Darius C. Jackson, marshal as aforesaid, which said deed is herewith shown to this honorable court, and to which, for greater certainty, your petitioner prays leave to refer.

And your petitioner further shows that Hans Crocker was appointed the receiver in this suit of said mortgaged property, and took possession thereof on the 11th day of June, in the year 1860; and your petitioner shows that the purposes for which he was appointed have been answered, and the duties of his office, (save accounting and being discharged,) are at an end, in consequence of a sale of the said mortgaged premises, under the decree in this suit.

Your petitioner further shows that said Hans Crocker, receiver of said mortgaged premises, is also the receiver of the eastern division of said La Crosse and Milwaukee railroad, to wit, from the city of Milwaukee to Portage City, appointed under certain judgment creditors' bills, filed against said
171 La Crosse and Milwaukee Railroad Company, and also against the Milwaukee and Minnesota Railroad Company, and also in the foreclosure suit of Bronson and Soutter against said La Crosse and Milwaukee Railroad Company and others; that, as your petitioner is informed and believes, the mortgage of the franchise of the said La Crosse and Milwaukee Railroad Company to the said complainants, described in the bill of complaint in this cause, is a mortgage of the entire franchise, to use, operate, manage, and control said La Crosse and Milwaukee railroad, for its entire length, from the city of Milwaukee to the city of La Crosse, and that the said mortgage is prior and superior to all the liens, claims, and incumbrances on said eastern division, by virtue of which said Hans Crocker, as such receiver, now holds and operates such eastern division of said road; that, by the foreclosure of the complainants' said mortgage in this case, the sale and confirmation under said decree, the conveyance of the marshal to said William Wallace Pratt and William H. White, the purchasers at said sale, the organization of your petitioner by said purchasers under and by virtue of the provisions of chapter seventy-nine of the Revised Statutes of the State of Wisconsin, concerning railroads, and the conveyances by said purchasers to your petioner of all and singular the said mortgaged premises, your petitioner has succeeded to all the rights, privileges, franchises, and immunities of the original La Crosse and Milwaukee Railroad Company, in running, operating, and controlling said railroad in its entire length, from the city of Milwaukee to the city of La Crosse, and that such rights so to run, operate, manage, and control the same is prior and superior to the rights of any of the defendants in this cause, and prior and superior to the rights of the mortgagees in the mortgage to said Greene C. Bronson and James T. Soutter, on the eastern division, under which said Hans Crocker is acting as receiver, inasmuch as the said mortgage to the said complainants is prior in date and lien to the mortgage said to Greene C. Bronson and James T. Soutter.

And your petitioner is informed and believes that it is entitled, in virtue

of the premises, to the possession, control, and management of the entire line of said railroad, from the city of Milwaukee to the city of La Crosse, and to run, operate, manage, and control, as a railroad, the whole line of said road, subject to the obligation to account and pay over to said receiver the net earnings and income of said eastern division, under the order and directions of this honorable court.

172 Your petitioner therefore prays that your honor will grant an order directing the said Hans Crocker, receiver as aforesaid, to deliver to your petitioner all and singular the said railroad from the city of Milwaukee to the city of La Crosse, its road-bed, track, and locomotives, engines, rolling stock, tools, implements, supplies, together with its depots, station-houses, engine-houses, and all other property belonging to said railroad, or used in operating the same, now in the possession of or subject to the control of said receiver, together with its appurtenances, rights, and franchises thereto appertaining, and that your petitioner be let into the possession and enjoyment thereof, your petitioner hereby offering to account to said receiver for the net tolls and income of said eastern division, under the direction and supervision of this honorable court, and to submit to such rules and regulations in respect thereto as this honorable court shall make and establish; and for such further and such other order as the court may see fit to grant.

And your petitioners will ever pray, &c.,

MILWAUKEE & ST. PAUL RAILWAY COMPANY.

Whereupon it is ordered by the court (Mr. Carpenter, in behalf of the Milwaukee and Minnesota Railroad Company, and Mr. Ryan, in behalf of William Crawshay and Orville Oddie, objecting) that the receiver deliver over to the said Milwaukee and St. Paul Railway Company the said railroad and appurtenances, between Portage City and La Crosse, and the rolling stock and property specially described in the decree.

And it is further ordered by the court that a full and perfect inventory be taken by the receiver of all rolling stock, other than the forty box cars specially mentioned in the decree, and of all personal property belonging to the said La Crosse and Milwaukee Railroad Company, including such as have been procured by the receiver and now on hand, and that he make report of the same on the eighth day of June next.

And as, in pursuance of the act incorporating the La Crosse and Milwaukee Railroad Company, a continuous road has been constructed and operated between La Crosse and Milwaukee, and the interest of the public requiring that the said road, as constructed and operated, shall continue to be so operated, it is ordered by the court, (reserving the right to rescind, change, or modify this order at any time hereafter,) that the said Milwaukee and St. Paul Railway Company and the receiver, who continues to be

173 the receiver of the eastern end or division of said La Crosse and Milwaukee Railroad between Milwaukee and Portage City, jointly operate said road between La Crosse and Milwaukee without interruption, and that the said Milwaukee and St. Paul Railway Company and the said receiver jointly employ all the agents and persons necessary for the proper operating of said road; that the revenues of said road be paid to the receiver as heretofore, who shall keep all accounts and books for the inspection of said company, and said company make, keep, duplicate books, and that all payments and disbursements for necessary expenses in operating said road shall be paid out of the joint fund, each division of said road to be entitled to its proportion of revenue, and to be charged with its proportion of disbursements, and that the said receiver pay coupons of bonds in prior mortgages as heretofore.

174 Whereupon, on the same day, a subpœna was issued returnable on the first Monday of September next, as follows:

175 UNITED STATES OF AMERICA,
District of Wisconsin, ss:

{SEAL OF COURT.} The President of the United States of America to James T. Soutter and Shepherd Knapp, survivors of Greene C. Bronson, deceased, William Wallace Pratt, William White, and the Milwaukee and St. Paul Railway Company, greeting:

You are hereby commanded, that you personally appear before the judges of the circuit court of the United States of America for the district of Wisconsin, in our court of chancery in and for the district aforesaid, on the first Monday of September next ensuing, at Milwaukee, to answer to a supplemental bill of complaint exhibited against you in our said court by the Milwaukee and Minnesota Railroad Company; and to do further and receive what our said court shall have considered in that behalf. And this you are not to omit under the penalty which may ensue.

This process of subpœna is directed to the marshal of this district, who is hereby commanded to serve the same upon the said James T. Soutter and Shepherd Knapp, survivors of Greene C. Bronson, deceased, William Wallace Pratt, William White, and the Milwaukee and St. Paul Railway Company, if to be found in his district, and due return thereof make.

Witness the Honorable Roger B. Taney, chief justice of the Supreme Court of the United States, at the city of Milwaukee, in the said district, this tenth day of August, in the year of our Lord one thousand eight hundred and sixty-four, and of our independence the eighty-ninth.

A. SCOTT SLOAN, *Clerk.*

MATT. H. CARPENTER, *Solicitor.*

It is ordered by our said court that the said James T. Soutter and Shepherd Knapp, survivors of Greene C. Bronson, deceased, William Wallace Pratt, William White, and the Milwaukee and St. Paul Railway Company, the defendants aforesaid, do enter their appearance in this suit, in the clerk's office, on or before the day and time at which this subpœna is returnable, as aforesaid; otherwise, the bill filed may be taken as confessed.

176 *Return.*

And afterwards, and on or before the return day of said subpœna, came the said marshal, and returned the same with his return endorsed thereon, as follows:

Served on the within named, the Milwaukee and St. Paul Railway Company, by delivering a true copy of this subpœna to A. Cary, secretary of said company, this 12th day of August, 1864. Served on the within-named William White by delivering him personally a copy of this subpœna, this 12th day of August, 1864.

D. C. JACKSON, *U. S. Marshal.*

Served on the within-named William Wallace Pratt, by delivering him personally a copy of this subpœna, this 13th day of August, 1864.

D. C. JACKSON, *Marshal,*
By W. S. JACKSON, *Deputy Marshal.*

Service	$6 00
Travel	12
Copies	1 20
	7 32

177 And afterwards, August 19, 1864, came the complainant, by Matt H. Carpenter, its solicitor, and filed its notice in writing, with the affidavits of A. Fleming, Austin Gunnison, and A. C. Gunnison, and Exhibits Nos. 1 and 2 attached, that application would be made to the Hon. S. F. Miller, presiding judge of this court, at Keokuk, Iowa, on the 30th day of August, 1864, at 2 o'clock p. m., for a writ of injunction, as follows:

Circuit court of the United States for the 9th circuit and district of Wisconsin, in equity.

THE MILWAUKEE AND MINNESOTA RAILROAD COMPANY, compl't, *vs.* JAMES T. SOUTTER and SHEPHERD KNAPP, survivors of Greene C. Bronson, the Milwaukee and St. Paul Railway Company, and others, defendants.	Suit by supplemental bill.

To the Milwaukee and St. Paul Railway Company, one of the above-named defendants:

Take notice that the Milwaukee and Minnesota Railroad Company, complainant in said supplemental bill, will make application to Hon. Samuel F. Miller, one of the associate justices of the Supreme Court of the United States and presiding judge of said circuit court, at Keokuk, in the State of Iowa, in said circuit, on the 30th day of August, A. D. 1864, at 2 o'clock p. m. of that day, to grant to the said Milwaukee and Minnesota Railroad Company a writ of injunction in this cause, to be issued according to law in such case provided, to be directed to the Milwaukee and St. Paul Railway Company, its officers, employees, agents, solicitors, and counsel, strictly enjoining them, and each and every of them, in the manner prayed
178 for in the said supplemental bill of complaint, or in such other form as the nature of its case may require.

To facilitate your preparation to oppose said application, if you desire, I herewith serve upon you a printed copy of the said supplemental bill of complaint, together with printed copies of such extracts from the exhibits attached thereto as are deemed material to the said application.

This application for said writ of injunction will be founded upon the said supplemental bill of complaint and exhibits thereto attached, which was exhibited and filed in said circuit court on the tenth day of August, 1864, and upon the affidavits of Alexander Fleming and Austin Gunnison in this cause verifying the said supplemental bill, which have this day been filed in the office of the clerk of the said circuit court, and copies of which are herewith served upon you.

Dated August 19, 1864.

MATT. H. CARPENTER,
Sol. for the Milwaukee and Minnesota Railroad Company.

Circuit court of the United States for the 9th circuit and district of Wisconsin, in equity.

THE MILWAUKEE AND MINNESOTA RAILROAD COMPANY, compl't, *vs.* JAMES T. SOUTTER and SHEPHERD KNAPP, survivors of Greene C. Bronson, deceased, and others, defendants.	Suit by supplemental bill.

179 *Verification of exhibits.*

DISTRICT OF WISCONSIN, *ss:*

Austin Gunnison, being first duly sworn, on oath says that he has examined and knows the contents of the exhibits attached to the said supplemental bill in this cause, exhibited by the Milwaukee and Minnesota Railroad Company on the 10th day of August, A. D. 1864; that he has compared the said exhibits with their respective originals, or with printed certified copies of the same, and that the same are true and correct copies therefrom.

AUSTIN GUNNISON.

Subscribed and sworn before me this 19th day of August, A. D. 1864.

A. SCOTT SLOAN,
Clerk cir. c't U. S. dist. Wis.,
By JAMES McFARLIN, *Deputy.*

Circuit court of the United States for the 9th circuit and district of Wisconsin, in equity.

THE MILWAUKEE AND MINNESOTA RAILROAD COMPANY, compl'ts, *vs.* JAMES T. SOUTTER and SHEPHERD KNAPP, survivors of Greene C. Bronson, the Milwaukee and St. Paul Railway Company, and others, defendants.	Suit by supplemental bill.

Affidavit of A. Fleming.

DISTRICT OF WISCONSIN, *ss:*

Alexander Fleming, being first duly sworn, on oath says that he is one of the directors and a member of the board of directors of the Milwaukee and Minnesota Railroad Company, the above-named complainant, and is the agent of said company in regard to all its litigation; that Matt. H. Carpenter, who signed the bill of complaint in this cause on behalf of said company, is the solicitor and counsel of said company, duly retained, constituted, and appointed, and authorized to commence and prosecute this suit on behalf of said company, as appears from a duly certified copy of resolutions
180 passed by the board of directors of said company, on the 27th day of May, A. D. 1864, hereto attached and marked Exhibit No. 1, which resolutions were passed at a meeting of the board at which this affiant was present, a quorum of said board of directors being present and voting for the same, as this affiant personally knows.

This affiant further says that he has heard read and knows the contents of the said bill of complaint exhibited in this suit by the said Milwaukee and Minnesota Railroad Company; that he has a general knowledge in regard to the several matters and things therein stated, acquired in taking charge of the litigation of said company for several years; and that he believes all the matters and things stated and set forth in said bill of complaint are true; that the making, execution, delivery, registration, and foreclosure of the said mortgages to said William Barnes, and the purchase of said mortgage premises by said Barnes, and the subsequent organization of the Milwaukee and Minnesota Railroad Company, as stated in said bill of complaint, are matters of common public notoriety; that the copies of said Barnes's mortgages attached as exhibits to said bill of complaint were copied from the records thereof, and that this affiant has examined the

original papers, certificates, affidavits, and records in relation to
181 the said foreclosure of said mortgages, and the organization of said Milwaukee and Minnesota Railroad Company, and the statements in the said bill of complaint in that behalf are true, as appears therefrom, and as this affiant verily believes. This affiant further says that the said Milwaukee and Minnesota Railroad Company is now a corporation existing under said organization and the laws of the State of Wisconsin, and as such was made a party defendant to the original bill of complaint exhibited by said Bronson, Soutter, and Knapp, as stated in said supplemental bill.

This affiant further says that all the statements in said supplemental bill in relation to the proceedings in the several causes therein mentioned are true, as appears from the original records and papers in said causes, or certified copies thereof, with which this affiant is perfectly familiar.

This affiant further says that the organization by the said William Wallace Pratt and William H. White of the Milwaukee and St. Paul Railway Company, as stated in said supplemental bill, appears from the affidavit of D. M. Hughes, made on the 7th day of May, A. D. 1863, and filed in the said cause of Bronson, Soutter, and Knapp, mentioned in said supplemen-
182 tal bill, the said Hughes then being the president of said last-named company.

This affiant further says that the statements in the said supplemental bill, that no proceedings were ever had or have been had at law or in equity to ascertain by judgment or decree the amount of net earnings of said eastern and western divisions, mentioned in said supplemental bill, are true.

This affiant further says that it is true, as stated in said supplemental bill, that said Milwaukee and St. Paul Railway Company claims and pretends that it has, by virtue of said sale and confirmation mentioned in said supplemental bill and its organization, become, as against the Milwaukee and Minnesota Railroad Company, the owner of all, or nearly all, of the rolling stock which was upon said railroad at the time of the appointment of the receiver, as mentioned in said supplemental bill, and all or nearly all of the said rolling stock purchased by the receiver mentioned as aforesaid, and all the franchises which belonged to the said La Crosse and Milwaukee Railroad Company, and has acquired the right, as against the said Milwaukee and Minnesota Railroad Company to use and operate the eastern division of the said railroad mentioned as aforesaid, and all the said rolling
183 stock and franchises, and to take, receive, and keep as its own all the earnings, income, and revenue thereof as against the said Milwaukee and Minnesota Railroad Company; and that the said Milwaukee and St. Paul Railway Company has been and is now, as stated in said supplemental bill, in the actual possession and occupation, use and enjoyment, of said eastern division, and all of the said rolling stock and franchises, as stated in said bill of complaint; and that Hans Crocker, esq., receiver, mentioned as aforesaid, filed in this court, on the 30th day of July, 1864, verified by him on oath, a report, a copy of which is hereto attached and marked Exhibit No. 2.

This affiant further says that Alfred Noxon is a director, and a member of the board of directors of the said Milwaukee and St. Paul Railway Company, and that at the city and State of New York, heretofore, to wit, on or about the 9th day of June, A. D. 1864, the said Alfred Noxon, then being a director as aforesaid, informed this affiant, in the presence of one Albert C. Gunnison, that the said Milwaukee and St. Paul Railway Company intended, immediately upon the the completion of the road from Columbus to Portage, to use and employ the said rolling stock, as mentioned in said bill,
184 upon the Watertown railroad, so called; that is, upon the road from Portage, by way of Columbus, to Milwaukee.

This affiant further says that it is, and for weeks has been, a matter of

common and public notoriety, that the said Milwaukee and St. Paul Railway Company were hastening the completion of the said road from Portage City to Columbus, and that said last-named company would have the same completed, and the said rolling stock, or the greater portion thereof, removed from the said eastern division before the September term of this court for 1864.

This affiant further says that the said Milwaukee and St. Paul Railway Company have in all things managed and conducted, and are now managing and conducting, the said eastern division so as to injure and oppress the said Milwaukee and Minnesota Railway Company; and that there was recently published in a newspaper printed in the city of New York, called the New York Times, a statement as follows:

"The earnings of the Milwaukee and St. Paul road, including the eastern division of the La Crosse not yet completely amalgamated, though practically owned by the new company, for

July, 1864, were	$168,307
July, 1863, were	105,397
185 Increase	62,910
From January 1, 1864, to 31st July	1,108,279
From January 1, 1863, to 31st July	787,066
Increase	321,213

And this affiant believes that the same was published by request of the officers of the Milwaukee and St. Paul Railway Company.

This affiant further states that the said rolling stock that was on said railroad mentioned in said supplemental bill when said receiver was appointed, except said forty box cars, was worth more than two hundred and fifty thousand dollars, and is now worth more than that sum, and that the said rolling stock, purchased by the said receiver, as mentioned in said supplemental bill is now worth more than one hundred thousand dollars.

This affiant further says that the said Greene C. Bronson, mentioned in the said supplemental bill, departed this life before the commencement of this suit, as this affiant is informed and believes, and that the death of the said Bronson has been suggested upon the record in the said eastern division foreclosure suit, mentioned in the said supplemental bill.

A. FLEMING.

Subscribed and sworn to before me this 19th day of August, A. D. 1864.

A. SCOTT SLOAN,
Clerk Cir. Ct. U. S. Dist. Wis.,
By JAMES McFARLIN, *Deputy*.

186 *Affidavit of C. Gunnison.*

DISTRICT OF WISCONSIN, *ss:*

Albert C. Gunnison, being first duly sworn, on oath says that he heard the conversation between the said A. Fleming and Alfred Noxon, stated in the foregoing affidavit of A. Fleming, and that the same is truly stated and set forth in said affidavit.

A. C. GUNNISON.

Subscribed and sworn to before me this 19th day of August, A. D. 1864.

A. SCOTT SLOAN,
Clerk Cir. Ct. U. S. Dist. Wis.,
By JAMES McFARLIN, *Deputy*.

Exhibit No. 1.

At a meeting of the board of directors of the Milwaukee and Minnesota Railroad Company, held in the city of Milwaukee on the 27th day of May, A. D. 1864, the following resolutions were adopted:

"*Resolved*, That this company approves, and hereby ratifies and affirms, all that has been done in the name and on behalf of said company, by its attorney, Matt. H. Carpenter, in the several suits and actions at law and in equity, in the courts of the United States for the district of Wisconsin, and in the courts of the State of Wisconsin.

"*Resolved*, That said Matt. H. Carpenter be requested and in-
187 structed, as the attorney, solicitor, and counsel of this company, to continue prosecution and defence for said company in the several suits, actions, and causes in the several courts where he has heretofore appeared on behalf of this company, or any of its stockholders, to prosecute or defend, in the name of said company, or any of its stockholders, and to take such steps and proceedings therein, by appeals, writs of error, or otherwise as he may deem for the best interests of this company.

"*Resolved*, That the secretary of said company, and each and every director of said company, be, and each of them is, authorized and directed to affix the seal of said company to any bill, answer, or petition, or other legal document whatever, on request, in writing or verbal, by said Matt. H. Carpenter.

"*Resolved*, That said Matt. H. Carpenter be, and he is hereby, directed to commence any suits, actions, or causes, in any of the courts of the United States or of the State of Wisconsin, or of any other State, at law or in equity, which he may deem necessary to protect the interests of this company.

"*Resolved*, That Alexander Fleming be, and he hereby is, appointed
188 agent of this company, to conduct its litigation and business pertaining thereto, and this company hereby ratifies and affirms all that he has heretofore done in its name or on its behalf in regard to litigation in which this company is interested or a party.

"*Resolved*, That, in the opinion of this board, it is of vital importance to the interests of this company to procure possession of its railroad and rolling stock, franchises, and other property of whatever kind, whether now in the hands of Hans Crocker, as receiver of the circuit or district court of the United States, or held by any other person or persons, party or parties; and the said Matt. H. Carpenter is hereby directed to take such steps towards procuring the same, in the name and in behalf of this company, as he may deem most advisable, whether by proceedings in pending cases, or by commencing new suit or suits, or both, as may, in his opinion, be most expedient to that end.

MILWAUKEE, *August* 19, 1864.

I hereby certify that the above and foregoing resolutions were duly
189 passed and adopted at a meeting of a board of directors of said Milwaukee and Minnesota Railway Company, on the 27th day of May, 1864, and are duly registered in the records of said company in the minutes of the proceedings of the said board on that day.

Witness my hand and the seal of said company, at Milwaukee, this 19th day of August, A. D. 1864.

[Seal of the Mil. & Minn. R. R. Co.]

DWIGHT W. KEYES, *Secretary.*

1583

Exhibit No. 2.

U. S. circuit court, State of Wisconsin.

JAMES T. SOUTTER, surviving trustee, }
vs. }
LA CROSSE AND MILW. RAILROAD *et al.* }

To the judges of the circuit court of the United States of America for the district of Wisconsin:

I hereby submit my report as receiver of the La Crosse and Milwaukee railroad, showing my receipts and disbursements for the month of June, 1864.

H. CROCKER, *Receiver.*

Balance cash on hand May 31, 1864		$70, 117 08
Receipts none.		
Disbursements:		
Right of way, eastern division	$905 00	
Incumbrances.....do.....	28 36	
1st mortgage bond coupons	155 98	
Cash on hand	69, 027 74	
		70, 117 08

190 STATE OF WISCONSIN,
Milwaukee County, ss:

Hans Crocker, being duly sworn, deposes and says that the foregoing is a true and accurate statement of his receipts and disbursements, as receiver of the La Crosse and Milwaukee railroad for the month of June, A. D. 1864, according to his best knowledge, information, and belief.

H. CROCKER.

Subscribed and sworn to before me this 20th day of July, A. D. 1864.

W. L. HINSDALE,
Notary Public, Mil. Co., Wis.

And afterwards, on the 19th day of August, due admission of service was endorsed thereon by the Milwaukee and St. Paul Railway Company, by Messrs. Cary and Pratt, its solicitors, as follows, to wit:

We admit service of a copy of the within, and copy printed of the supplemental bill, this 19th day of August, A. D. 1864.

CARY & PRATT,
Solicitors for the Milwaukee & St. Paul Railway Company.

191 And afterwards, on the 24th day of August, A. D. 1864, notice of application for injunction to William Wallace Pratt, William H. White, and Cary & Pratt, solicitors of James T. Soutter and Shepherd Knapp, complainants, in the original bill filed, which notice is as follows:

Circuit court of the United States for the 9th district of Wisconsin, in equity.

THE MILWAUKEE AND MINNESOTA RAILROAD COMPANY, complainants, }
vs. }
JAMES T. SOUTTER AND SHEPHERD KNAPP, survivors of Greene C. Bronson, the Milwaukee and St. Paul Railway Company, and others, defendants. } Suit by supplemental bill.

To Messrs. Cary and Pratt, solicitors for James T. Soutter and Shepherd Knapp, survivors of Greene C. Brown, deceased, complainants named in the bill of complaint, against the La Crosse and Milwaukee Railroad Company, and others, defendants: To William Wallace Pratt and
192 William H. White, defendants to said supplemental bill:

Take notice that the Milwaukee and Minnesota Railroad Company, complainants named in said supplemental bill, will apply to the Honorable Samuel F. Miller, one of the associate justices of the Supreme Court of the United States, and presiding judge of said circuit court at Keokuk, in the State of Iowa, in said circuit, on the 30th day of August, A. D. 1864, at 2 o'clock p m. of that day, to grant to the said Milwaukee and Minnesota Railroad Company a writ of injunction in this cause, to be issued according to law in such case provided, to be directed to the Milwaukee and St. Paul Railway Company, its officers, employees, its agents, attorneys, solicitors, and counsel, strictly enjoining them and each and every of them in the manner prayed for in the said supplemental bill of complaint.

To facilitate your preparation to oppose said application if you desire, I herewith serve upon you and each of you a printed copy of the said supplemental bill of complaint, together with printed copies of such ex-
193 tracts from the exhibits attached thereto as are deemed material to the said application.

This application for said writ of injunction will be founded upon the said supplemental bill of complaint and exhibits hereto attached, which was exhibited and filed in said circuit court on the 10th day of August, 1864, and upon the affidavits of Alexander Fleming and Austin Gunnison in this cause verifying the said supplemental bill which have been this day filed in the office of the clerk of the said circuit court.

Dated August 19, 1864.

MATT. H. CARPENTER,
Solicitor for the Mil. & Min. Railroad Co.,
Complainant in Sup. Bill.

Due admission of service being endorsed thereon as to William Wallace Pratt, as follows:

"We admit service of a copy of the within, and copy printed of the supplemental bill this 19th day of August, A. D. 1864.

"W. W. PRATT."

And affidavit of service as to Messrs. Cary and Pratt, solicitors for
194 James T. Soutter and Shepherd Knapp, in the original bill of complaint against the La Crosse and Milwaukee Railroad Company and others, as follows:

DISTRICT OF WISCONSIN, *ss:*

Austin Gunnison, being first duly sworn, on oath says that, at the city of Milwaukee, in said district, on the 19th day of August, A. D. 1864, he served a copy of this notice, and copy printed of supplemental bill, on Messrs. Cary & Pratt, solicitors for James T. Soutter and Shepherd Knapp in the original bill of complaint against the La Crosse and Milwaukee Railroad Company and others, by delivering the same to and leaving the same with them.

AUSTIN GUNNISON.

Subscribed and sworn to before me this 24th day of August, A. D. 1864.

A. SCOTT SLOAN, *Clerk,*
By JAMES McFARLIN, *Deputy.*

And afterwards, on the 29th day of August, 1864, the affidavit of Austin Gunnison was filed as follows:

1585

195 Circuit court of the United States for the 9th circuit and district of Wisconsin, in equity.

THE MILWAUKEE AND MINNESOTA RAILROAD COMPANY
vs.
JAMES T. SOUTTER AND SHEPHERD KNAPP, survivors, &c., and others.
} Suit by supplemental bill.

DISTRICT OF WISCONSIN, *ss:*

Austin Gunnison, being first duly sworn, on oath says that he is informed and believes that the defendant, the Milwaukee and St. Paul Railway Company, has been engaged for several days in removing rolling stock belonging to the eastern division of the La Crosse and Milwaukee Railroad Company, so-called, off from said division; and that he has been to examine the situation of the rolling stock at the Milwaukee station, within the last twenty-four hours, and finds no passenger cars at or about said station, and but two locomotives fit for use on the road belonging to said eastern division; that there has usually been from five to fifteen passenger cars in and about said station, and ten or fifteen locomotives at same time. He
196 further says that it is generally understood in Milwaukee that said company has removed, and is removing, said rolling stock to evade any injunction that may be granted in this cause, and that said removal commenced after notice was given of the application for an injunction in this cause.

AUSTIN GUNNISON.

Subscribed and sworn to before me this 29th day of August, A. D. 1864.
A. SCOTT SLOAN, *Clerk*,
By JAMES McFARLIN, *Deputy*.

And afterwards, on the 5th day of September, 1864, came the defendant the Milwaukee and St. Paul Railway Company, by Messrs. Cary & Pratt its solicitors, and filed its demurrer, as follows:

Circuit court of the United States for the 9th circuit and district of Wisconsin.

The demurrer of the Milwaukee and St. Paul Railway Company to the bill of complaint of the Milwaukee and Minnesota Railroad Company,
197 against the said Milwaukee and St. Paul Railway Company and others:

This defendant by protestation, not confessing or acknowledging all or any of the matters and things in the said complainant's bill to be true, in such manner and form as the same are therein set forth and alleged, doth demur thereto, and for cause of demurrer showeth:

First. That this court has no jurisdiction of this cause as to this defendant, for the reason that the said complainant and this defendant are both corporations formed under and in pursuance of the laws of the State of Wisconsin, and each having its place of business in said State.

Second. That this defendant, as appears by the said supplemental bill, is not a party to the original bill therein, in part stated and set forth; nor does it appear by the said supplemental bill that any new matter has, or is pretended to have, arisen since the making of the decree in the said original cause.

Third. That it appears in and by said bill of complaint that the de-
198 cree rendered in the said original suit had been completely executed

and performed prior to the filing of the bill of complaint in this cause; and

Fourth. That the said complainant hath not, in and by his said bill, made or stated such a case as doth or ought to entitle it to any such discovery or relief as is thereby sought and prayed for from or against this defendant.

Whereupon this defendant demands the judgment of this honorable court whether it shall be compelled to make any further or other answer to the said bill, or any of the matters and things therein contained, and prays to be hence dismissed with its reasonable costs in this behalf sustained.

CARY & PRATT,
Solicitors for Defendant M. & St. P. R. R. Co.

We hereby certify that the foregoing demurrer is well founded in point of law.

CARY & PRATT, *of Counsel.*

199 And on the 5th day of September, 1864, the defendant, the Milwaukee and St. Paul Railway Company, by Messrs. Cary & Pratt, its solicitors, entered in the Rule and Order Book an order setting said demurrer down for argument, as follows:

Rule.

Circuit court of the United States for the 9th circuit and district of Wisconsin, in equity.

THE MILWAUKEE AND MINNESOTA RAILROAD COMPANY
vs.
THE MILWAUKEE AND ST. PAUL RAILWAY COMPANY *et al.*

On motion of Cary & Pratt, solicitors for defendants, Milwaukee and St. Paul Railway Company, ordered, that the above-entitled cause be, and the same is hereby, set down for hearing on bill of complaint and demurrer of said defendant at the next term of said court.

CARY & PRATT,
Solicitors for Def'ts Mil. & St. Paul Railway Co.

200 And afterwards, on the 20th day of September, 1864, the demurrer of the defendant, the Milwaukee and St. Paul Railway Company, to the bill of complaint in this cause, came on to be heard, and was argued by counsel, and the argument not being concluded, the same was adjourned until to-morrow morning.

And afterwards, on the 21st day of September, 1864, came the parties by their counsels, and the argument of the demurrer in this cause was resumed, and the same being concluded, the court took the same under advisement.

And afterwards, on the 29th day of September, 1864, came the parties by their counsel, and the Milwaukee and Minnesota Railroad Company ask leave to attach to the supplemental bill of complaint in this cause the order of said district court in the western division case, made on the 7th day of May, A. D. 1863, marked Schedule "A;" and that it be taken and
201 considered as a part of said supplemental bill, it is ordered by the court that said amendment to said supplemental bill be, and is hereby, made previous to the determination of the demurrer thereto.

Thereupon the demurrer to said supplemental bill thus amended came on to be heard, and was argued by counsel, and on consideration thereof it is ordered by the court that said demurrer be, and the same is hereby, sus-

tained; and it is further ordered, adjudged, and decreed by the said court that said supplemental bill be, and the same is hereby, dismissed at the cost of the complainant.

And this day came the said complainant, the Milwaukee and Minnesota Railroad Company, by its counsel, and prayed an appeal to the Supreme Court of the United States; whereupon it is ordered by the court that said appeal be allowed upon the said complainant giving bond according to law.

202 And afterwards, to wit, on the 28th day of October, A. D. 1864, came the said Milwaukee and Minnesota Railroad Company, by its counsel, and filed its bond for appeal, with sureties duly approved by the Honorable Andrew G. Miller, district judge and one of the judges of said court, which bond, with the approval thereon, is as follows, viz:

Circuit court of the United States for the district of Wisconsin, in equity.

THE MILWAUKEE AND MINNESOTA RAILROAD COMPANY *vs* JAMES T. SOUTTER AND SHEPHERD KNAPP, survivors of Greene C. Bronson, trustees, &c., the Milwaukee and St. Paul Railway Company, and others, defendants.	Suit by supplemental bill.

Know all men by these presents that the Milwaukee and Minnesota Railroad Company, as principal, and Austin Gunnison and Geo. C. Stevens, as sureties, are held and firmly bound unto James T. Soutter and Shepherd Knapp, survivors of Greene C. Bronson, the Milwaukee and St. Paul Railway Company, William Wallace Pratt, and William H. White, in the penal sum of five hundred dollars, lawful money of the United States, for the payment of which, well and truly to be made, we and each of us hereby bind ourselves, our heirs, executors, and administrators, firmly by these presents.

203 Sealed with our seals, and dated this 4th day of October, A. D. 1864.

Provided, however, the condition of this obligation is this: whereas the Milwaukee and Minnesota Railroad Company, above bonded, has appealed in this cause to the Supreme Court of the United States, now, therefore, if the said Milwaukee and Minnesota Railroad Company shall prosecute its said appeal to effect, and answer all costs in case it shall fail to make good its appeal, then this obligation shall be void; otherwise, of force.

The Milwaukee and Minnesota Railroad Company, by—

[SEAL.] AUSTIN GUNNISON,
One of the Directors of said Company.

AUSTIN GUNNISON. [SEAL.]
GEO. C. STEVENS. [SEAL.]

DISTRICT OF WISCONSIN, *ss:*

Austin Gunnison and Geo. C. Stevens, being first duly sworn, each for himself, on oath, says that he is worth the sum of five hundred dollars over and above all liabilities and exemptions of property from forced sale on execution, and that he is a citizen, resident, and freeholder of the State of

204 Wisconsin.

AUSTIN GUNNISON.
GEO. C. STEVENS.

Subscribed and sworn to before me this 27th day of October, A. D. 1864.

JAMES McFARLIN,
Commissioner U. S. Circuit Court Dist. of Wisconsin.

I hereby approve of the within bond, and sureties thereof, and allow said appeal, this 28th day of October, A. D. 1864.

A. G. MILLER, *District Judge.*

205 The United States of America to James T. Soutter and Shepherd Knapp, survivors of Greene C. Bronson, deceased, the Milwaukee and St. Paul Railway Company, William Wallace Pratt, and William H. White, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the first Monday of December next, pursuant to an appeal filed in the office of the clerk of the United States circuit court for the district of Wisconsin, wherein the Milwaukee and Minnesota Railroad Company is appellant and you are appellees, to show cause, if any there be, why the said decree in the said appeal mentioned, dismissing the supplemental bill of complaint of the said appellent, should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable James M. Wayne, first associate justice of the Supreme Court of the United States, this 28th day of October, A. D. 1864.

A. G. MILLER, *District Judge.*

We hereby admit due service of this citation this 28th day of October, A. D. 1864.

CARY & PRATT,
Solicitors for Mil. and St. Paul Railway Co.
W. W. PRATT.

206 UNITED STATES OF AMERICA,
District of Wisconsin, ss:

I, A. Scott Sloan, clerk of the circuit court of the United States of America for the district of Wisconsin, do hereby certify that I have compared the writings annexed to this certificate, and they are true copies of their respective originals, and are correct transcripts therefrom, and of the whole thereof, now on file, and remaining of record in my office.

In testimony whereof, I have hereunto set my hand and duly affixed the seal of the said court, at the city of Milwaukee, in the said district of Wisconsin, this 28th day of October, in the year of our Lord one thousand eight hundred and sixty-four, and of the independence of the said United States the eighty-ninth.

[SEAL.]

A. SCOTT SLOAN, *Clerk.*

Fees, $85 95.

Filed November 5, 1864.

1589

1393

Supreme Court, United States.

Petition of Milwaukee & Minnesota Rail Road Company,

TO HAVE TWO JUDGES ASSIGNED TO HOLD THE APRIL AND SEPTEMBER TERM, 1864, OF THE CIRCUIT COURT OF THE U. S., FOR THE DISTRICT OF WISCONSIN.

MAT. H. CARPENTER,
For Petitioner.

1, U. S. Statutes at large, 333; Brightly's Digest, page 125, section 12.

News Steam Print.

1595

To the honorable, the judges of the Supreme Court of the United States of America.

Your petitioner the Milwaukee and Minnesota Railroad Company, a corporation existing under and by virtue of the laws of the state of Wisconsin, respectfully represents:

That the La Crosse and Milwaukee Railroad Company was a corporation created by the laws of the State of Wisconsin, and authorized to build, equip, and operate a Railroad between Milwaukee on Lake Michigan and La Crosse on the Mississippi River; and that said Company did build and equip the same. That that portion of said road lying between Milwaukee and Portage is called the Eastern Division, and that portion lying between Portage and La Crosse is called the Western Division of said road. That said Company, under authority granted by the Legislature of said State, executed to Greene C. Bronson, James T. Soutter and Shepherd Knapp, as trustees, a certain trust deed or mortgage to secure certain bonds therein mentioned, said mortgage dated the 31st day of December, 1856, conveying and mortgaging the said Western Division and the rolling stock and franchise of said Company pertaining thereto. That afterwards on the 17th of August, 1857, the said Company made, executed and delivered to Greene C. Bronson and James T. Soutter, Trustees, a certain other mortgage or deed of trust dated that day to secure certain bonds therein mentioned, to the amount of one million of dollars, conveying and mortgaging the said Eastern Division, together with the rolling stock and franchises pertaining thereto.

That afterwards, on the 21st day of June, 1858, the said Company made, executed and delivered to one William Barnes a certain other mortgage to secure certain bonds therein mentioned to the amount of two millions of dollars and by which, said company conveyed and mortgaged the entire of said Railroad and all the franchises, rolling stock and property, real, personal and mixed of said Company; and that afterwards on the 21st day of May, 1859, the said last named mortgage was duly foreclosed by the said Barnes by advertisement and sale, which sale was held on the day and year last aforesaid; and that at said sale the said Barnes, in pursuance of express Legislative enactment in that behalf, became the purchaser of said Railroad, franchises, rolling stock, and other property so sold; and immediately thereafter he the said Barnes, in pursuance of the Laws of the State of Wisconsin in that behalf, organized your petitioner under its corporate name, "The Milwaukee and Minnesota Railroad Company;" and your petitioner ever since has been and now is a body corporate under the Laws of said State: and has been and is the owner of all the said Railroad, Rolling Stock and Franchises, things in action and property of every kind and nature belonging to said La Crosse and Milwaukee Railroad Company; and that the said La

Crosse and Milwaukee Railroad Company, did not, nor did any other party or person redeem the said Railroad, Rolling Stock, Franchise and other things so sold, and purchased by said Barnes within one year after said sale, and that thus and thereupon your petitioner became, ever since has been, and now is the absolute owner of all said Railroad, Rolling Stock, Franchises, Property and things in action, so purchased by said Barnes, subject to all legal liens and encumbrances thereon at date prior to the date of the said mortgage to said Barnes.

Your petitioner further states that, about the 1st day of December, 1859, the said Bronson, Soutter and Knapp commenced in the District Court of the United States for the District of Wisconsin, in equity, a suit in their name as complainants against your petitioner and others to foreclose the said mortgage upon the said Western Division given to them as herein before stated; and that the said Bronson and Soutter about the same time, commenced another suit in said District Court in Equity, against your petitioner and others to foreclose the said mortgage upon the said Eastern Division given to them as herein before stated; that said two suits were in all respects separate, the complainants in one not being made parties defendant to the other; and the complainants in neither of said suits claiming or asking any relief as against the complainants or mortgage sought to be foreclosed in the other.

That said two suits proceeded in said District Court to final decree of foreclosure and sale, which decrees were duly entered in said suits, respectively, on the 13th day of January, A. D. 1862. That in said Western Division suit the said Bronson, Soutter and Knapp, complainants, did not appeal from said decree, but proceeded to execute the same by a sale of the mortgaged premises in that suit, and the same were sold under said decree on the 25th day of April, 1863, and the purchasers at said sale pretended to organize as a corporation under the corporate name of the Milwaukee and St. Paul Railway Company, which sale was reported by the Marshal to the said District Court, and by the said District Court the said sale was confirmed on the 5th day of May, A. D. 1863; but the said Marshal never reported said sale to the Circuit Court of the United States for said District to which Court your petitioner claims the said Western Division suit was transferred by the act of Congress of July 15, 1862, organizing the said Circuit Court; and your petitioner claims that said sale has never been confirmed by any Court having jurisdiction and authority to confirm the same.

That the said complainants, Bronson and Soutter, in said Eastern Division suit appealed from the final decree therein to this Court, and this Court upon said appeal at the December term, 1863, reversed said final decree and remanded said suit to said Circuit Court with directions among other things, as follows: "*To ascertain the amount* "*of moneys in the hands of the Receiver, or Receivers*, from the earn-

"ings of the road covered by the mortgage which may be *applicable* "*to the discharge of the interest, and apply it to the same*, and that if "the moneys thus applicable is not sufficient to discharge the interest "due on the first day of March, 1864, then *to ascertain the balance* "*remaining due at that date*; and in case such balance is not paid "within one year *from the date of the order of the Court ascertaining* "*it*, then, an order shall be entered directing a sale of the mortgaged "premises under the direction of the Court."

Your petitioner further shows that at the April term of the said Circuit Court, in A. D. 1864, your petitioner applied to said court in said Eastern Division Cause for possession of the said Eastern Division of the said Railroad to which it was entitled on payment of interest due in said cause, less the amount of funds in the hands of the Receiver in said cause applicable thereto, your petitioner then and there offering to pay the same within some short time to be fixed by said court; but that the Honorable Samuel F. Miller, presiding Judge of said court, and the Honorable Andrew G. Miller, District Judge, and Judge of said court differed in opinion as to the granting the prayer of said petition; and the said Honorable Samuel F. Miller then and there filed his written opinion therein, a copy of which is hereto attached and marked Exhibit No. 1. And afterward the said Andrew G. Miller published his opinion, a copy of which is hereto attached and marked Exhibit No. 2.

Your petitioner further shows that on the 12th day of June, 1863, the said District Court made an order in said Eastern Division suit directing the Receiver to deliver possession of the said Railroad, Rolling Stock and Franchises to the said Milwaukee and St. Paul Railway Company to operate the same; and said last named company immediately thereafter in pretended pursuance of said order entered into possession of and commenced operating the same; and that after the decision of this court upon your petitioners application for a Writ of prohibition, at the last term of this court to the effect that said suit was pending in the Circuit Court and not in said District Court, and that the said order of said District Court on the 12th day of June, 1863, was *coram non judice* and void, the said Circuit Court made an order in said cause on the 28th day of April, 1864, vacating said order of the 12th June, 1863, and directing the said Milwaukee and St. Paul Railway Company to redeliver to said Receiver the said railroad, rolling stock and franchises—the mortgaged premises in said suit; but the said Milwaukee and St. Paul Railway Company have never obeyed said order of April 28, 1864, but still continue in the actual operation of said premises under a pretended arrangement with said Receiver.

Your petitioner further shows that the said Milwaukee and St. Paul railway company is a rival and competitor of your petitioner, and operates a competing line of railroad from Milwaukee to Portage

city; and that the interests of the said Milwaukee and St. Paul railway company are directly opposed to the interests of your petitioner, and that it is for the interest of the said Milwaukee and St. Paul Railway Company to injure and destroy the said Eastern Division, owned by your petitioner; and that the said Receiver in said Eastern Division suit without any authority from the court in that behalf now permits said Eastern Division, Rolling Stock and Franchises to be operated by said Milwaukee and St. Paul railway company, well knowing the unfriendly feeling and hostile interest of said company in reference to your petitioner as the owner of said mortgaged premises; as appears from an extract of the deposition of the said Receiver taken before H. L. Palmer, Esquire, an auditor appointed by said Circuit Court to examine and report upon said Receiver's accounts, a copy of which is hereto attached and marked Exhibit No. 3; and that said Milwaukee & St. Paul Railway Company admits that it now holds over one hundred and forty thousand dollars revenues arising from said Eastern Division, which ought to be in said Receivers hands, and your petitioner claims that said last named company has in its hands which should be paid over to said Receiver nearly the sum of five hundred thousand dollars; that said Receiver has never given any bond whatever in this cause and that the only bond which the said Receiver ever gave was in another cause and only for the sum of fifty thousand dollars; and your petitioner is informed and believes that the said Milwaukee and St. Paul Railway Company is insolvent and on the eve of open bankruptcy; and that said sum of money will be entirely lost to your petitioner unless the prayer of this petition shall be granted by your honors; and that all the net earnings of the Eastern Division since the 1st of May, 1864, remain in the hands of the said last named company except about twenty thousand dollars.

Your petitioner further shows that at the September term of said Circuit Court, A. D. 1864, your petitioner showing to said court that the said Milwaukee and St. Paul Railway Company admitted in its hands over one hundred and forty thousand dollars net revenues arising from the mortgaged premises in said Eastern Division suit, and the report of said Receiver on file in said cause showing the balance in his hands of about sixty thousand dollars exclusive of the said balance in the hands of the said Milwaukee and St. Paul Railway Company, making about the sum of two hundred thousand dollars in all. Your petitioner applied to said court for an order directing the said receiver to pay into court the money in his hands that the same might be applied in payment of the interest due the complainants in said cause; as your petitioner claimed the mandate from this court in said cause required said Circuit Court to do; but that the said judges of the said court differed and divided in opinion as to granting said application and thereupon and for that reason the same was denied by said Circuit Court, and the said Circuit Court at

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said term and without ascertaining what balance of funds was in the said receiver's hands applicable to the payment of the interest due the complainants, and without making any order applying such balance to the payment of said interest as directed by said mandate—did make an order or decree that there was due the complainants for interest in said cause the sum of $405,290 5-100 dollars and directing that unless that sum should be paid within one year therefrom, that then and in that case the said premises should be sold.

Your petitioner further shows that the accounts of the said Receiver in the said Eastern Division suit have been referred to H. L. Palmer, Esquire, to audit and report to the April term of said Circuit Court for A. D. 1865; that one question involved in the said accounts relates to the ownership of the Rolling Stock which was on said road at the time of the decree under which said Western Division was sold, as hereinbefore stated; and that the amount so dependent upon said question will vary the balance which your petitioner claims should be in the Receiver's hands in said Eastern Division suit from two hundred and fifty thousand to five hundred thousand dollars.

Your petitioner further shows that a petition is now pending in the said Circuit Court in the said Western Division foreclosure suit on behalf of your petitioner to compel the Marshal to report said sale of said Western Division to said Circuit Court; that another petition by your petitioner is pending in said Eastern Division foreclosure suit in regard to said Rolling Stock, and as to the custody and operation thereof and for the removal of the said Receiver and for other relief necessary to your petitioner and proper to be granted; all of which said petitions with other applications and motions in said causes will be for hearing before said Circuit Court at the April term thereof, A. D. 1865; that the report of the said auditor will be before said court for confirmation at that time; and your petitioner desires at that term to pay into said court in said Eastern Division suit such sum as may be necessary when added to the amount ascertained to be in the Receiver's hands applicable thereto, to pay all the interest, costs and expenses to which the said complainants in that suit are entitled and will thereupon apply for an order to be let into possession of said mortgaged premises.

Your petitioner further shows that should the Honorable the judges of said Circuit Court again disagree as to your petitioner's entering into possession of said mortgaged premises and the same should be continued in their present management your petitioner would be ruined before the said cause could be heard on appeal in this court, and the said property would have to be sold upon encumbrances prior in time to the right of your petitioner; so that should your petitioner succeed in establishing its right to such possession upon appeal in this court, such success would come too late to save said property to your petitioner. Your petitioner shows, that the net

earnings of the Eastern Division for the month of September, 1863, were reported to the said Circuit Court, as follows:

Earnings	$111,121 13
Expenses	53,399 09
Net	57,722 04

That the result of operating said Eastern Division for the same month in 1864, is reported to the said Circuit Court, as follows:

Earnings	$51,016 79
Expenses	53,505 29
Deficiency	$2,488 50

Your petitioner further shows that the said Eastern Division, franchises and property pertaining thereto are worth the sum of one million of dollars over and above all liens and encumbrances thereon prior to the right of your petitioner; and your petitioner is ready and willing to pay off all sums that are due upon said prior encumbrances and take and operate said property so as to keep down the accruing interest on said prior encumbrances and pay the same as they shall mature; that the principal stockholders of the Milwaukee and St. Paul Railway Company are anxious to secure a sale of said Eastern Division which shall extinguish your petitioner's right thereto; and are in all things managing and conducting said Eastern Division by collusion with the said Receiver so as to reduce as much as possible the net revenues to arise therefrom.

Your petitioner therefore prays your honors sitting in the Supreme Court of the United States, to assign two of the Justices of said Supreme Court to attend the said Circuit Court of the United States for said District of Wisconsin, at the April term thereof, A. D. 1865, and also the September term thereof for the same year, and that the said justices so assigned may attend the said circuit court at said respective terms according to the act of Congress in such case made and provided.

THE MILWAUKEE AND MINNESOTA RAILROAD COMPANY.

(Its Seal.)

By A. FLEMING, *Vice President and Agent.*

MATT. H. CARPENTER,
Solicitor and of Counsel.

DISTRICT OF WISCONSIN, ss: Alexander Fleming being first duly sworn, on oath says, that he is the Vice-President and agent of the above named Milwaukee and Minnesota Railroad Company and

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a member of the board of Directors; that he has read and knows the contents of the foregoing petition; and that the statements therein contained are true.

A. FLEMING.

Subscribed and sworn to before me,
this 1st day of December, A. D. 1864.

JAMES McFARLIN,

Commissioner of United States Circuit Court,
District of Wisconsin.

EXHIBIT No. 1.

CIRCUIT COURT, UNITED STATES.

CHARLES HOWARD, ASSIGNEE, &c., *vs.* THE LA CROSSE AND MILWAUKEE RAILROAD COMPANY, and others.

JAMES T. SOUTTER, SURVIVING TRUSTEE, &c., *vs.* THE LA CROSSE AMD MILWAUKEE RAILROAD COMPANY, SELAH CHAMBERLAIN, THE MILWAUKEE AND MINNESOTA RAILROAD COMPANY, and others.

OPINION BY JUSTICE SAMUEL F. MILLER.

The first suit above mentioned, is a proceeding in Chancery, instituted in the District Court of the United States for this District, while it possessed Circuit Court powers, to enforce a judgement lien on the Road of the La Crosse and Milwaukee Railroad Company. It was commenced in 1860, and a Receiver was appointed who took charge of the whole Road, and all its appurtenances, on the eleventh day of June of that year. Prior to this, on the 9th day of December 1859, the plaintiffs in the second suit, who were trustees in a mortgage to secure $1,000,000 covering the Eastern end of the Road from Milwaukee to Portage, had brought their suit in the same court to foreclose their mortgage; and on their motion the same person was appointed Receiver of this part of the road [on the 6th day of July, 1860,] who had been previously appointed Receiver of the whole Road in the Howard suit. The amount of Howard's judgment is about $20,000, and is conceded to be subordinate in its lien to the mortgage to Bronson & Soutter. The District Court rendered a decree in favor of Bronson & Soutter for half the amount of the debt secured by their mortgage, and ordered a sale and foreclosure. From this decree they appealed to the Supreme Court, which, at its recent term reversed that decree, and held that the plaintiffs were entitled to the full amount of the bonds secured by the mortgage, with the accruing interest. The Mandate of the Supreme Court, which is now before us in the Circuit Court, directs us to ascertain the amount of interest due on these bonds, on the first day of March last, after deducting such sums as may be in the hands of the

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Receiver applicable to that purpose; and if that sum with the accruing interest and costs is not paid within twelve months from the date of the order ascertaining the amount, then the Road is to be sold. The Milwaukee and Minnesota Railroad Company now comes forward and propose to pay this sum within a short time to be fixed by the court, say twenty or thirty days, and asks that an order be made that upon such payment, the Receiver be discharged, and directed to deliver to said company the Rail Road from Milwaukee to Portage, with the rolling stock and other appurtenances properly belonging to it, and asks that a similar order be made in the Howard suit.

The granting of this order is resisted by the plaintiffs in the Bronson & Soutter foreclosure suit, by the plaintiff in the Howard suit, by Selah Chamberlain, and by a party describing itself as the Milwaukee and St. Paul Railway Company.

It is very obvious that if the plaintiffs are paid all that is due them on their mortgage, the order appointing a Receiver in this suit should be discharged, unless some very stringent reason exists for its continuance; and in that event it becomes the duty of the court to inquire what it will do with a road thus left on its hands, with no further right to hold it, except that arising from the claim of Howard, which will be noticed hereafter.

I. The first inquiry in this view of the case is, as to the claim of the Milwaukee and Minnesota Railroad Company. They are the real owners of the Road of which they now ask possession, and in them is vested the legal title thereof.

The La Crosse and Milwaukee Railroad Company, which built the Road, and which gave the mortgage to Bronson & Soutter, afterwards made a mortgage to William Barnes. This mortgage was foreclosed by a proceeding prescribed by the statutes of Wisconsin, and the purchasers at the sale organized themselves under the laws of Wisconsin, into the corporation now setting up this claim. By virtue of that sale and foreclosure, this company became the successors in interest of the La Crosse and Milwaukee Rail Road company, and the owners and holders of the legal title to its road, appurtenances and franchises.

An attempt is made on this motion to question the regularity and the fairness of those proceedings, but this cannot be admitted for two reasons:

First, This corporation was made a defendant to the foreclosure suit by plaintiffs, and has been recognized by them, and by this court, and by the Supreme Court of the United States, as an existing corporation, and it is certainly too late in the day for any purpose of this suit to question its legal existence on a motion of this kind.

Second, The Supreme Court of the United States in this case, in which we are now considering its mandate, has passed upon this very question, and has decided that the Milwaukee and Minnesota Railroad company has become the owner of said Road, and that by virtue of

the foreclosure proceedings under the Barnes mortgage, all liens subsequent in date to that mortgage, including the claim of Howard, were cut off and forever barred. The language of the Supreme Court is this: "Now it appears that each of these judgments were recovered after the date of the mortgage of the La Crosse and Milwaukee company, upon the foreclosure of which the Milwaukee and Minnesota company was formed. The liens of these judgments were cut off by its foreclosure; indeed, the judgment of Howard of November, 1858, and the last judgment of Graham & Scott, which was recovered in 1860, never were liens upon any interest in the Road of the La Crosse and Milwaukee Railroad company, the defendants in the judgments, as the equity of redemption had already passed to the purchaser under the sale to Barnes in the foreclosure of the third mortgage, and afterwards became vested in the Milwaukee and Minnesota Railroad company. These judgment creditors, according to their answers, have no interest in the subject matter of this litigation."

This opinion was rendered in a proceeding to which all those who oppose the present motion were parties, except the Milwaukee and St. Paul Railway company, which has acquired any interest it may have in the property now under consideration *pendente lite*.. In the case of Russell vs. Ely, 2d Black's R. 575, the Supreme Court has decided that the mortgagee of real estate does not acquire the legal title to the mortgaged premises, nor the right of possession except by the consent of the owner, and that the holder of the legal title may maintain ejectment against the mortgagee in possession. It cannot be controverted then, that the Milwaukee and Minnesota Railroad company is the legal owner of the property of which it asks possession, so far as the parties to this suit are concerned, and in this proceeding.

II. I next proceed to examine the objections raised by each of the parties I have mentioned, to the discharge of the Receiver and to placing the road in the possession of that company.

First, The plaintiffs object, because they say that the road itself and its appurtenances are not a sufficient security for their debt, and that during the year which is given by the Supreme Court for the payment of the arrears of interest, they should be retained in the hands of the Receiver, that the accruing revenue may be applied thereto.

The road bed on which plaintiff's mortgage is a lien, is 95 miles from Milwaukee to Portage, besides the depots, rolling stock, and other appurtenances belonging to it. It constitutes a part of the direct line from the former city to the Mississippi river, which is one of the most valuable routes, both present and prospective, in the United States. The gross annual earnings, by the reports of the Receiver, which are before us, for the past year, from this ninety-five miles, are about eight hundred thousand dollars. It is in good condition, and there is no reason to believe that when the road is transferred from the control of a Receiver to that of the real owner, its value or its receipts will be diminished. There are two mortgages prior to that of plaintiff's,

the aggregate amount of which is about twelve hundred thousand dollars, on which the interest is all paid. The mortgage of plaintiffs without interest, added to this, will make about two millions two hundred thousand dollars, which the road must be worth to secure plaintiffs. If we consider its annual gross receipts just stated, the fact that the party now asking possession proposes to pay some $300,000 or $400,000 of the plaintiff's debt to get possession, and that the decree which we are to render, must stand as security for plaintiff's debt, on which he can have an order of sale for any installment of interest when it becomes due, it would seem to be the merest pretense that his security requires the longer continuance of a Receiver, after that sum shall have been paid. If plaintiff gets the decree which the Supreme Court awards him for his unpaid interest, and that sum is paid him, and there remains to him ample security for the remainder of his debt, with speedy and sure means of enforcing its payment, there can be no reason why he should longer keep the property from the control of its owner.

Second, With regard to Howard, I have already shown that the Supreme Court has decided that he has no further interest in the property. It is said that opinion was delivered under a mistake of fact. Perhaps it was so, and perhaps in a proper proceeding in his case, it may be found that he has a valid subsisting lien, but on this motion I must consider the presumption to be the other way, and act accordingly. But suppose it was conceded that his lien was valid; it amounted, when this suit was brought, to less than $16,000, and shall this road with its eight hundred thousand dollars per annum receipts be kept in a Receiver's hands for this $20,000 when the courts are all open to him for the prosecution of his claim in the ordinary mode? Is there no means of enforcing a lien or collecting a debt but through a Receiver? He has had his Receiver now for four years, and has received but one thousand dollars, and has taken no steps in his cause since the order appointing a Receiver. It surely cannot be necessary to argue against a proposition to continue a Receiver under such circumstances, when no other object is to be attained than the payment of this debt, the lien of which on the property is extremely doubtful.

III. Mr. Chamberlain objects, that he has a lien of over $700,000 on the road by judgment, and that he was in possession under a lease which gave him that possession as security for his debt, when the order appointing a Receiver was made which took it from him. If these facts were true, and his lease were unimpeached, or his debt conceded to be just, I should have no hesitation in discharging the Receiver, to replace the property where the court found it on making the appointment, and as the matter is now presented to me, I have also no hesitation in saying that Mr. Chamberlain's objection to the discharge of the Receiver is the only one which has deserved a moment's consideration. It is, however, not true that Mr. Chamberlain was in possession when the Receiver was appointed. The terms of

his lease required him (out of the proceeds of the road) to keep down the interest on the mortgage of the plaintiff in the suit. This he failed to do, and either voluntarily, or because he could not help himself, surrendered possession of the property to the plaintiff, some fourteen or fifteen days before the order appointing a Receiver in the Howard case. This fact is conceded by all parties, and is distinctly proved by Mr. Dow in the principal suit, and shown by the accounts returned into this court in that case. So that when the Receiver was appointed in the Howard case, the property was taken by this court from the plaintiffs in this suit, and not from Mr. Chamberlain. Again, it is urged that by the failure of Mr. Chamberlain to keep down the interest on the mortgages, and by his parting with the possession, he has abandoned his claim under that lease, and can no longer insist on the right to hold possession of the property as his security. I must confes that upon examining that lease in the light of this conceded fact, it is by no means clear to me that if Mr. Chamberlain should bring his action to recover possession, he would be entitled to it; the consideration, or the main consideration, has failed. After permitting the property to be kept from himself and its owners now for four years, and subjected to all the hazards of sale and loss, it would seem that his right to its possession must have terminated at all events.

But I cannot shut my eyes to the fact, in an application like this, addressed in some sense to the discretion of the court, that Mr. Chamberlain's judgment, which was for the debt secured by the lease, stands upon a very doubtful basis as to its validity and justice. It is certainly true that a decree has been obtained against him, which is in full force and unreversed, setting aside and vacating that judgment.

And although I do no not purpose here to determine whether that decree can be used by the La Crosse and Milwaukee company, or by its successor, the Milwaukee and Minnesota company, yet it certainly must have a persuasive influence in determining whether a Receiver should be continued for the benefit of that judgment, or whether if he is discharged, the possession should be remitted to Mr. Chamberlain.

When I add to these considerations the fact that there is, in my opinion, sufficient security for any lien Mr. Chamberlain may have on the road, that the courts are open to him to enforce that lien, and that although a party to all the suits concerning this road, he has never thus far either by original or cross bill, set up a claim to any relief, I do not think his objections are sufficient to induce us to continue the Receiver, or that he is entitled to the possession of the property on the Receiver being discharged.

IV. The Milwaukee and St. Paul Railway company is an organization created since this litigation commenced. It is no party to either of the suits named. It has no shadow of right to the property

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in question, yet the personal interests of its corporators are obvious. Owning the Western end of the La Crosse and Milwaukee Railroad from Portage to La Crosse, 105 miles, and organized for the purpose of operating a Road, as its name imports, from Milwaukee to St. Paul, the ownership and control of the Eastern end, is indispensable to their purpose. They say in their answer to the petition of the Milwaukee and Minnesota company, that their corporation and its directors own eight hundred and twenty-four of the bonds secured by the Bronson & Soutter mortgage. They came before the District Court in June last, and procured an order that the Receiver should deliver to them the Eastern end of the Road, and all its appurtenances, and they have used them from that day to this as they pleased.

The Supreme Court declared the proceeding of the District Court to have been without jurisdiction, and the order a usurpation of authority, yet they come forward now and insist upon being continued in the possession thus illegally acquired.

I say they have no shadow of legal claim to the possession of this property. The pretense that in buying the Western end of the road under a mortgage foreclosure, they also bought the franchises of the Eastern end, including the right to run it exclusively, and leaving to the owners of the Eastern end, and its prior mortgagees, no other right than to receive from them a rent for such use, does not deserve a moment's serious consideration, and will receive from me no other attempt at refutation than the bare statement of the proposition.

But while their legal rights are thus weak, their interest in the matter is of the strongest character. The necessities of their situation require that they should own the Eastern end of the Road, to complete their line from Milwaukee to St. Paul. They own nearly all the bonds secured by the mortgage to Bronson and Soutter.

Although the Supreme Court has declared that the Milwaukee and Minnesota company *own* the Eastern Division, the exigencies of the Milwaukee and St. Paul company require that *they* should own it.

It is from this source that springs all the fierce opposition to the discharge of the Receiver, and to placing the property into the hands of its owners.

The Supreme Court pursued the extraordinary course of taking from the Circuit Court the discretionary power of limiting the time usually given in foreclosure decrees to pay the money. It also decided that the time in which the payment might be made should be twelve months, instead of ninety days, which is the most usual period. And this was done in a case where the plaintiffs had already been four years prosecuting their suit. The reason for this extraordinary course is obvious. It was to enable the Milwaukee and Minnesota company, which that court declared to be the owner of the Road, to redeem what they considered an immensely valuable property. But this just and benevolent design of the court is to be defeated by keeping the control of the Road in the hands of those whose interests require it to be sacrificed and sold, that they may buy it in.

The owners of the Road here proffer to pay every dollar that is due on it, which is uncontroverted, prior to their own claim, and are ready to litigate disputed claims if they can get possession; yet for the benefit of those who have no claim, whose interests require them to have their neighbors property right or wrong, we are to refuse possession of this valuable property to its true owners, and continue it in the hands of those who will favor this sacrifice.

I do not trust myself to any expression of the feelings such a course must naturally generate in the bosom of any honest Judge, but content myself with placing on the record of this court, *my solemn protest*, and my regret at my utter inability to prevent it.

EXHIBIT NO. 2.

U. S. CIRCUIT COURT, APRIL TERM 1864.

GREENE C. BRONSON and JAMES T. SOUTTER vs. the LA CROSSE & MILWAUKEE RAILROAD COMPANY, SELAH CHAMBERLAIN and others.

OPINION BY MILLER, DISTRICT JUDGE.

A petition is presented to this court in behalf of the Milwaukee & Minnesota Railroad Company, praying an order to put said company into possession of the Eastern Division of the La Crosse and Milwaukee Railroad, covered by the mortgage to complainants, upon paying the amount of interest due. The interest is not paid nor tendered by the company.

Selah Chamberlain was in possession of the Railroad under a lease from the La Crosse & Milwaukee Company, when the mortgage was made by said company to Barnes as Trustee, under which the Milwaukee and Minnesota Company claims title; and he was removed from such possession, by these complainants under their mortgage, or by proceedings under this bill, or the bill of Sebra Howard, but it is not important at this time, under which.

Chamberlain and the Minnesota Company were made defendants in this bill as incumbrancers or owners. Chamberlain answered, setting up his lease, and also his judgment against the La Crosse Company for over six hundred thousand dollars, and claiming to be paid out of the proceeds of sale of the mortgaged premises. The Minnesota Company did not answer the bill, but let it be taken as confessed.

The District Court, on the petition of John S. Rockwell, and A. Fleming, stockholders of the Minnesota Company, charging said company with fraud of their interests, for not appearing and answering the bill in this case; and praying leave to answer in the name of the Minnesota Company, allowed them to file such answers, from a desire to discharge a faithful duty to all parties, and to extend to them the privilege of a full hearing. Those answers made the principal defense, in which the amount claimed by the bill was reduced one half.

The Minnesota Company was organized in pursuance of a sale *in*

pais to foreclose the Barnes mortgage. Its title is the same in law, as if the La Crosse Company had conveyed to it, subject to prior incumbrances, during the pendency of this bill. It is only entitled to possession as purchaser of the equity of redemption, subject to prior incumbrances. It acquired no right by a decree or judgment of a court. Has it any more right to possession, than the La Crosse Company would have? Chamberlain claims the right to contest the title of the Minnesota Company, and that company has a right to contest Chamberlain's lien.

These matters should be adjudicated upon pleadings and proofs admitting an appeal. On this petition, there is neither an appeal nor a certificate of division of opinion, to the Supreme Court. The Minnesota Company contested the consideration of Chamberlain's lien as set up by his answer, and took testimony for several months before the Masters appointed in this case who reported about four hundred thousand dollars in his favor. To enable the District Court to decide this contest, between these two defendants, according to equity practice, the Minnesota Company were allowed to file a bill against Chamberlain for that purpose; which bill I understand has been discontinued. Unless in a clear case, the court cannot put into possession a purchaser *in pais* of an equity of redemption subject to prior incumbrances disputing the legality of the purchase.

The bill in the case of Newcomb Cleveland against the La Crosse and Milwaukee Railroad Company and others, was in aid of an execution levied to remove the incumbrance of Chamberlain's lease and judgment. Whether the decree annulling said lease and mortgage was strictly correct or not, it was responsive to the prayer of the bill and had relation to the bill. It should not, I think, have a greater effect than the bill prayed for; that is to remove the incumbrance from the way of the execution levied. But, I think, the company cannot on this petition preclude Chamberlain from setting up his lease and judgment. He has a right to have his claim tried in an adverse suit, between himself and the Minnesota Company, either before the sale of the mortgaged property, or for the surplus after the sale. Thus far, for this purpose, every opportunity has been given by the District Court, to this Company and its stockholders. We cannot judicially decide on this petition for possession that Chamberlain forfeited his lease. The Supreme Court did not pass upon Chamberlain's claim, in its opinion in this case.

The first appointment of a Receiver was made on a judgement creditor's bill of Sebra Howard against the La Crosse Company.—The same Receiver was subsequently appointed in the case of these complainants. The mortgage of complainants being prior in date to Howard's judgement, the orders made from time to time were made in this case. The Receiver's monthly reports are filled in both cases. Howard's judgement in the District Court was founded on a judgement record from the Circuit Court of Milwaukee County—whereby

it appears that the judgement in that court was rendered on the first day of May 1858, for a sum exceeding twenty five thousand dollars. The judgement in the State Court was prior to the mortgage to Barnes. The judgement in the District Court was subsequent. The Supreme Court in passing on the judgements against the La Crosse Company as liens considered the Howard judgement subsequent in lien to the Barnes mortgage, from an imperfect statement of the judgements in the record before them. They did not pass on the question whether the lien of the Howard judgement should exist from the date of the judgement in the State Court, or the District Court.

As I understand it, the record before them, not containing the evidence of the foundation of the judgement in the District Court, that question remains open. Suits on judgement, I think, do not extinguish their liens. They were the common law manner of reviving judgements. The revival whether by action or *scire facias*, has relation to the original judgement. Under an execution issued on the judgement in the State Court, property was sold to the amount of obout eleven thousand dollars; but no sale being allowed under an execution on a judgement at law, of a railroad and its appurtenances, the remedy in the Howard judgement was by a judgement creditor's bill. And Howard is entitled to retain that bill and continue the Receiver, until the property of the judgement debtor is exhausted by legal proceedings, or the judgement is paid. If the Minnesota Company choose, they can by answer contest the lien of the judgement, if they are a party defendant; and if not, the Court will permit them to become a party and make the defense. Howard is not now here in a position to meet this question on the petition for posession.

We cannot know judicially that the property described in the mortgage of the complainants, subject to prior mortgages to a large amount, is an adequate security for the accrued and accruing interest on this debt of one million of dollars, without satisfactory evidence, and until the Receiver files his full account. The revenues for the last year appear large, but I think it will appear that necessary expenditures and disbursements leave not large balances.—Until judicially satisfied from the Receiver's accounts, of the adequacy of the security, the Receiver should not be discharged, unless he has wilfully or negligently mismanaged the estate. A rule will be made upon the Receiver to file a continuous monthly account of receipts and disbursements from the time of his appoint'ment.

I am anxious that the necessity for retaining the Receiver should not exist, for a day. I wish to have him discharged as soon as a due regard to the rights of the public and the parties will allow of it.

The first duty of the Court is to secure the interests of the public, under the grant of the charter to the La Crosse Company. The second duty is to protect the rights of the lien creditors and the parties litigant. The Receiver was appointed for these two purposes.

For this purpose the orders of the 12th of June 1863, in this case

and in the Howard case, modifying the original orders, appointing the Receiver, were made. The Milwaukee & St. Paul Company were allowed by those last orders to operate temporarily the Eastern Division of the road in connection with the Western Division, of which they were owners, for the sake of economy in operating the road, to secure the use of all the rolling stock on the whole line, and to restrain the St. Paul Company from diverting trade and travel from the Eastern Division. It was known that the St. Paul Company were about to connect their division, from Portage City with the Watertown road, and thence to Milwaukee, which might affect the Eastern Division.

The order allowing that Company to operate the Eastern Division subject to the control of the Court and the supervision of the Receiver, and under heavy bonds with adequate security, prohibited them from putting a car on their extension from Portage or on any other road east of that point. I considered it a proper duty for the public and the parties to secure the use of a continuous route, according to the charter, without interruption or deviation of trade or travel, between the termini of the road.

There is a disposition not to discriminate between these orders, for the temporary and conditional operation of the road by the St. Paul Company, and an order for the absolute and adverse possession of the Minnesota Company.

The order of the twelfth of June in the Howaad case was made in the Circuit Court where the bill was pending; and in this case in the District Court. The order of the District Court in this case was made under the universal belief, that, according to the opinion of the Supreme Court, the record remained in the District Court, for its proceedings, as a final decree, under the act of March 3d, 1863. The Supreme Court having since announced, that the record should have been transfered to the Circuit Court under the Act of July 15, 1862, the order of the District Court is to be considered of no validity; and it is my duty to order it rescinded. For the reasons here given the orders of the 12th of June, 1863, will be rescinded, and the Eastern Division and appurtenances restored to the Receiver, under his original appointment.

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EXHIBIT NO. 3.

EXAMINATION OF HANS CROCKER, RECEIVER,

CONTINUED.

Question.—Since the 13th of June, 1863 have you been in actual possession and have you in fact operated the Eastern Division and its rolling stock, actually receiving the revenues thereof and disbursed the expenses of operating the same?

Answer.—From the 13th June, 1863 to May 1864, the St. Paul Company was in posession of and operating the Eastern Division of the road under the order of the Court, since then it has been in my possession.

Question.—Have you since May 1, 1864 actually operated the Eastern Division and its rolling stock, and have you in fact received the revenue arising therefrom and disbursed the expenses of operating the same?

Answer.—Since the 1st of May, 1864 I have operated the road. There is a part of the balance of the earnings in the hands of the St. Paul Company not paid over.

Question.—From and after the orders of the Court of the 28th of April, 1864 requiring the St. Paul Company to deliver the possession of the Eastern Division to you, what change in fact was made as to the possession and operation of the Eastern Division?

Answer.—The possession of the Eastern Division was surrendered to me the same as I surrendered the road to them, it was surrendered to me by Mr. Hughes or Mr. Goodrich and I took it.

Question.—I do not speak of theories or constructive possession and operation, I ask for the actual, tangible, visible fact, and do you say that since May 1st, 1864, you have been operating the Eastern Division and its rolling stock?

Answer.—I say yes.

Question.—Have you actually been in receipt of the revenues of the Eastern Division since May 1st, 1864?

Answer.—About the 1st of May when I took possession of the Eastern Division of the road I found that under the order of the Court and the claim of the St. Paul Company that the rolling stock of the Eastern Division would not be sufficient to operate that Division, it would have been necessary for me to open a new set of books and employ a new set of officers, had I determined to run the Eastern

Division independent of the Western Division, I therefore told Mr. Goodrich I wanted him to operate the Eastern Division of the road, to run it for me; to retain the necessary officers or to consider them in my employment jointly with the St. Paul Road, and to keep the accounts the same as they had been kept by the St. Paul Company for the year previous, showing the proportion of earnings applicable to each division. I consider that arrangement the best arrangement for the Eastern Division. To have opened a new set of books would have required a large expenditure and have taken a great deal of labor and time—at least one month before they could have been got up.

Question.—In making this arrangement, was Mr. Goodrich then acting on behalf of the St. Paul Railway Company, and was your arrangement really with that Company through Mr. Goodrich as its agent?

Answer.—Mr. Goodrich was at that time the General Manager of the Milwaukee and St. Paul Company, I made the arrangement with him as manager of the road of the St. Paul Company, but so far as he was to act with me it was made with him personally.

Question.—Are the Earnings of the Eastern Division since May 1, 1864, received by Mr. Goodrich as your personal representative or are they received by the Milwaukee and St. Paul Railway Company.

Answer.—They are received as they had been received before that time by the Milwaukee and St. Paul Company, or by their receiving officers.

Question.—Is it true that you are actually in receipt of the revenues arising from the Eastern Division since May 1, 1864?

Answer.—The revenues of the Eastern Division are subject to my orders and have been since May 1, 1864.

Question.—With whom have you kept your bank account as receiver since June 11, 1860?

Answer.—With the Wisconsin Marine & Fire Insurance Companies Bank.

Question.—Have you as Receiver made deposits or kept a bank account elsewhere than at that bank?

Answer.—From time to time I have had small deposits with the Merchants Bank in this City, mostly arising from collections made by the Merchants Bank.

Question.—By whom are the Conductors, Engineers and other employees engaged in the actual operation of the Eastern Division since May 1, 1864, employed and paid?

Answer.—They are the same men who were employed in the same capacity by the St. Paul Company when I took possession of the Road. Ever since I took possession of the road Mr. Goodrich has always employed these men, they are paid by the St. Paul Road, and a proportion charged to the Eastern Division.

Question.—On and after April 28th, 1864 was any change whatever made in the actual management of the Eastern Division except the method of keeping accounts, if so, what?

Answer.—The road was running just as it had been before, accounts kept between the two divisions, earnings and expenditures divided *pro rata.*

Question.—Have you since June 13, 1863, ever demanded of the St. Paul Company the possession of the rolling stock that was on the road, when you was appointed Receiver and took possession, except the forty box cars mentioned in the Land Grant Decree, if so when and where and upon what officer or person of said Company did you make such demand?

Answer.—About the 29 or 23 of April, 1864 at the, office of Cary & Pratt in Milwaukee, I stated to Mr. Hughes, the President of the St. Paul Company, the substance of the orders restoring the Eastern Division to me and demanded the posession of the road and the rolling stock, I went into no particulars as to the rolling stock, wanted to get all I could. He replied, you shall have possession of the road and all the rolling stock that the Eastern Division is entitled to.

Question.—Have you ever made any other demand for any part of the rolling stock mentioned in the last question, except that mentioned by you in your last answer?

Answer.—I have had frequent conversations with Mr. Hughes since that time, in all of which he has reiterated what he said before, that the rolling stock on the road at the time I took possession of the road and a portion of the stock bought and built by me, belonging to the Western Division, the Land Grant road.

Question.—How much and what rolling stock did the St. Paul Company surrender to you upon this demand?

Answer.—I cannot answer that without going into figures, I can ascertain and furnish it.

Question.—Did they surrender to you any Locomotive, if so what is its number or description?

Answer.—They surrendered to me about seven Locomotives, but I cannot give the numbers.

Question.—State how, in what manner and in whose presence this rolling stock was surrendered to you by the St. Paul Company. How many locomotives and how described by numbers or otherwise and how many and what passenger and other cars, giving the number and description of each?

Answer.—It was surrendered by Mr. Goodrich in the office of the Company, no one was present but Mr. Goodrich and myself, the rolling stock was not in view, it was on the road, particular Locomotives and cars were not specified, the statement hereto annexed and marked Exhibit N. N. shows the amount of interest in rolling stock then transferred to me.

Question.—Was it not understood before you made this demand that the Eastern Division and rolling stock should remain in the possession of the St. Paul Company, and be operated as you have stated, and was not the demand and the pretended surrender of possession to you merely formal.

Answer.—There was no such understanding at all, direct or indirect, or otherwise, and the arrangement was the best that could have been made for the Eastern Division.

Question.—Did you accept what took place between you and Goodrich as a delivery of possession to you?

Answer.—I did.

Question.—What day did this take place?

Answer.—I think it was the last day of April, 1864.

Question.—On what day was the arrangement made between you and the St. Paul Company that you have stated in relation to their operating the Eastern Division.

Answer.—I think it was on the same day.

Question.—Is not the St. Paul Company operating a road in competition with the Eastern Division, from Milwaukee by way of Columbus to Portage City?

Answer.—They are.

Question.—Is not the pecuniary interests of that Company as the owner of a competing line of road directly opposed to the interest of the Eastern Division?

Answer.—I suppose it is.

Question.—Since the completion of that Companies line of road are not the agents and runners both at Milwaukee and La Crosse employed by the St. Paul Company, endeavoring to divert business from the Eastern Division.

Answer.—I know nothing of that at all.

Question.—Are there any runners or agents employed by you at Milwaukee or La Crosse to compete with the St. Paul Company as to business between Milwaukee and Portage?

Answer.—I have none.

Question.—Since the completion of that Company's Line, has not the through travel and freight ceased over the Eastern Division, so far as it is in their power to produce that result?

Answer.—The natural tendency of passengers and traffic would be to go on a through line either to Milwaukee or La Crosse, and such has been the result.

Question.—What was the average earnings of the Eastern Division per day for ten days before and ten days after the St. Paul Company, commenced operating their competing line, as near as you can state from your knowledge and recollection?

Answer.—I will furnish such a statement.

EXAMINATION SUSPENDED.

September 12, 1864.

HANS CROCKER, Receiver.

DIRECT EXAMINATION RESUMED.

Question.—Since the completion of their road by the St. Paul Company, do trains run through from Milwaukee to La Crosse or from La Crosse to Milwaukee as they did before that time over the Eastern Division?

Answer.—They do.

Question.—Since the completion of their road by the St. Paul Company, do not the trains that leave La Crosse for Milwaukee, avoid the Eastern Division and come from Portage to Milwaukee over the St. Paul Company's Road by the way of Watertown?

Answer.—The through trains run from La Crosse to Milwaukee by the way of Watertown, but the passenger trains make the connection East and West at Portage.

Question.—Is not the St. Paul Company now using the Rolling Stock on the Road when you were appointed Receiver, except the 40 Box cars on the Watertown Branch or Division of the road, in connection with the Western Division owned by the St. Paul Company?

Answer.—Substantially they are, but they furnish the Eastern Division of the road all the cars and engines necessary to do the business of the Eastern Division.

Question.—Can passengers now leave Milwaukee for La Crosse over the Eastern Division, and go through without change of cars?

Answer.—They cannot.

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1625

SUPREME COURT OF THE UNITED STATES.

No. 279. DECEMBER 7, 1864.

THE MILWAUKEE AND MINNESOTA RAIL ROAD CO.,
Appellants.

versus

JAMMES T. SOUTTER, et. al.,
Survivors, &c.

Motion that Cause may be heard out of its order.

MATT. H. CARPENTER,
Counsel for Appellants.

1627

SUPREME COURT OF THE UNITED STATES.

No. 279. DECEMBER TERM, 1864.

THE MILWAUKEE AND MINNESOTA RAILROAD COMPANY,
Appellant,
vs.
JAMES T. SOUTTER, et. al,
Survivors, &c.

Here in Court comes the Milwaukee and Minnesota Railroad Company, by Matt H. Carpenter its solicitor and counsel, and moves the Court now here for an order that this cause be taken up and heard out of its order on the calendar of causes of the present term; and that the same be heard at some day in the present term.

And the said Milwaukee and Minnesota Railroad Company pray leave to refer in support of this motion to the affidavit of Austin Gunnison, hereto attached and to the transcript of the record on file in this Court in this cause; and also to transcript of record in cause 280, on the calendar of the present term, being the appeal of the Milwaukee and Minnesota Railroad Company, and A. Fleming in the cause which in said bill is styled the Eastern Division foreclosure cause.

MATT. H. CARPENTER,
Soliciter and Counsellor for Appellant.

SUPREME COURT OF THE UNITED STATES.

No. 279. DECEMBER TERM, 1864.

THE MILWAUKEE AND MINNESOTA RAILROAD COMPANY,

Appellant,

vs.

JAMES T. SOUTTER, et. al,

Survivors, &c.

DISTRICT OF WISCONSIN,—ss.

Austin Gunnison being first duly sworn on oath says, that he is thirty-one years of age, that he is a resident of the City of Milwaukee in said District, that he is a member of the Board of Directors of the Milwaukee and Minnesota Railroad Company, the appellant in said cause which is a corporation existing under the laws of the State of Wisconsin, and that he is acquainted with its business and the nature, extent and character of the property, Railroad franchises and rolling stock of said Company and that the title of the said Company, thereto is truly and correctly stated in the bill of complaint in the nature of a supplemental bill exhibited by the appellant as complainant in this cause.

This affiant further says, that the rolling stock owned by said Company as stated in said bill of complaint is of the value of about one million of dollars; that the same is all now used and operated by the Milwaukee and St. Paul Railway Company, as stated in said bill in open defiance and contempt of the orders of the Circuit Court of the United States for

the District of Wisconsin, and by collusion with Hans Crocker, Esq., Receiver of said Court as particularly set forth and stated in said bill.

This affiant further says, that the said Milwaukee and St. Paul Railway Company are now using and operating almost the whole of said rolling stock owned by said appellant upon the Railroad from Milwaukee by way of Watertown to Portage, and from Portage to La Crosse, a road rival to and competing with the said Eastern Division mentioned in said bill. And that the very small amount of said rolling stock which the said Milwaukee and St. Paul Railway Company, permit to be used and operated upon said Eastern Division, to which all of said rolling stock, pertains and belongs, is in the opinion and belief of this affiant insufficient for the transaction of the business which might otherwise be done upon said Eastern Division; and that the said Milwaukee and St. Paul Railway Company has been selling rolling stock belonging to it within the last sixty days, relying upon the rolling stock belonging to said appellant to operate the railroad from Milwaukee by way of Watertown to Portage and La Crosse.

This affiant further says, that upon the basis adopted by the Receiver for the division of earnings between the Eastern and Western Divisions and which this affiant believes to be just and equitable the net earnings of the saidEastern Division during the fall and winter months of 1863, were as follows:

September	$57,722 04
October	$80,173 14
November	$40,778 69
Total net earnings, 3 months,	$178,673 87

This affiant further says that since the Milwaukee & St. Paul Railway company diverted the said rolling stock owned by said appellants as aforesaid the net earnings of the said Eastern Division as reported to the said Circuit Court during the same months of A. D. 1864, were as follows:

September excess expenses,	$2,488 50
October excess expenses,	492 94
Total	$2,981 44
November net earnings,	4,262 16
Total net earnings, 3 months,	$1,280,72

This affiant further says that Exhibit No. 1 hereto attached is a certified copy of the report of the said Receiver and a statement by the Milwaukee & St. Paul Railway Company of the earnings of the said Eastern Division for the months of September, October and November, A. D. 1864.

This affiant further says that unless this cause shall be heard at the present term, he believes that the said Eastern Division will be continued in its present management; that the judges of the said Circuit Court have heretofore divided in opinion as to the continuance of the receivership mentioned in said bill of complaint; and this affiant believes that the said judges will always differ and disagree upon any motion, application or petition for the relief which the appellant is justly entitled to; that the said rolling stock is a species of property which deteriorates rapidly with use; that said rolling stock kept in good repair and properly used deteriorates in value at least twenty per cent. per annum in value.

AUSTIN GUNNISON,

Subscribed and sworn to before me, this twenty-third day of January, A. D., 1865.

JAMES McFARLIN,

Deputy Clerk, U. S. Circuit Court.

1631

SUPREME COURT OF THE UNITED STATES.

No. 279. DECEMBER TERM, 1864.

THE MILWAUKEE AND MINNESOTA RAILROAD COMPANY.

Appellant,

vs.

JAMES T. SOUTTER, et. al,

Survivors, &c.

To CARY & PRATT,

Solicitors and Counsel for Appellees in the above entitled cause.

Take notice that on the opening of the said Supreme Court at the Capitol in Washington City, on the morning of February 3d, A. D. 1865, or as soon thereafter as counsel can be heard, the appellant in the above entitled cause will move said Supreme Court for an order that this cause be taken up and heard by said Supreme Court out of its order on the calendar of causes of said term; and that the same be heard upon some day in the present term of said Court to be named in said order.

This motion will be founded upon the affidavit of Austin Gunnison a copy of which is hereto attached and upon the transcript of record in the Supreme Court in this Cause, and also to the transcript of record in

cause 280 on the calendar of the present term; being the appeal of the Milwaukee & Minnesota Railroad Company and A. Fleming in the cause which in said bill is styled the Eastern Division foreclosure cause.

The said motion and copy of said affidavit are hereto attached and are herewith served upon you.

Dated January 23, A. D. 1865.

MATT H. CARPENTER,

Solicitor and Counsel for Appellant.

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EXHIBIT NO. 1.

STATEMENT of the operation of the Milwaukee and St. Paul Railway, Eastern Division, for the month of September, 1864:

EARNINGS.

From Freight		$33,976 10
Passengers		16,197 32
Mails, Rents and Miscellaneous		843 37
Total Earnings		$51,016 79

EXPENSES.

Repairs of Road	12,740 66	
Bridges	378 91	
Fences		
Buildings	417 17	
Locomotives	1,316 80	
Cars	1,850 60	
Tools and Machinery	1,517 37	
Operating: Management and General Office	580 00	
Foreign Agency and Advertizing	64 41	
Station Service	3,768 20	
Stationary and Printing	217 65	
Conductors, Baggagemen and Brakemen	2,128 92	
Train and Station Supplies	575 48	
Engineers, Firemen and Wipers	3,173 58	
Oil and Waste	1,322 40	
Fuel	2,313 00	
Damage to Property		
Loss and Damage to Freight and Baggage	662 48	
Personal Injuries	88 67	
Legal Expenses		
Car Service	114 42	
Miscellaneous Expenses	181 02	
Animals Killed		
Freight Earnings Refunded		
Passenger Earnings Refunded		
Mail Earnings Refunded		
Telegraph	43 61	
Locomotive Service	1,732 00	
Furniture	7 75	
OTHER EXPENSES		
Interest and Exchange	36 28	
New York Office Expenses		
Taxes, U. S. Revenue	1,270 22	
Renewal of Track	1,256 27	
New Building	525 60	
State Tax	15,221 82	
		$53,505 29

RECAPITULATION.

Gross Earnings	$51,016 79
Total Expenses	53,505 29
	$ 2,488 50

J. P. WHALING, *Chief Clerk.*

AUDITOR'S OFFICE, Milwaukee, Sept. 30th, 1864.

STATEMENT of the operation of the La Crosse & Milwaukee Railroad, Eastern Division, for the month of October, 1864.

EARNINGS.

From Freight,	$18,401 55
Passengers,	13,379 97
Mails, Rents and Miscellaneous,	986 98
Total Earnings,	$32,768 50

EXPENSES.

Repairs of Road,	$11,110 39
Bridges,	
Fences,	3 70
Buildings,	466 72
Locomotives,	1,212 55
Cars,	1,926 33
Tools and Machinery,	1,977 62
Operating: Management and General Offices,	591 40
Foreign Agency and Advertising,	
Station Service,	3,194 92
Stationary,	884 44
Conductors, Baggagemen and Brakemen,	1,660 50
Train and Station Supplies,	460 79
Engineers, Firemen and Wipers,	3,648 50
Oil and Waste,	1,745 48
Fuel,	2,439 00
Damage to Property,	
Loss and Damage of Freight and Baggage,	252 85
Personal Injuries,	
Legal Expenses,	
Car Service,	
Miscellaneous Expenses,	110 49
Animals Killed,	
Telegraph,	32 48
Rent,	12 50
Furniture,	3 61

OTHER EXPENSES.

Interest and Exchange,	
New York Office Expenses,	
Taxes, U. S.,	801 15
Renewal of Track,	156 50
New Buildings,	578 52
Total Expenses,	$33,261 44

RECAPITULATION.

Gross Earnings,	$32,768 50
Total Expenses,	33 261 44
Net Earnings,	
Excess Expenses,	492 94

AUDITOR'S OFFICE, Milwaukee, Nov. 20th, 1864.

J. P. WHALING, *Chief Clerk.*

Filed January 23, 1865. by D. W. KEYES.

STATEMENT of the operation of the La Crosse and Milwaukee Railroad, Eastern Division, for the month of November, 1864.

EARNINGS.

From Freight,	$18,791 10
Passengers,	12,046 86
Mails, Rents and Passengers,	840 37
Total Earnings,	$31,678 33

EXPENSES.

Repairs of Road,	7,470 57
Bridges,	
Fences,	729 62
Buildings,	528 47
Locomotives,	1,271 79
Cars,	2,352 84
Tools and Machinery,	2,105 19
Operating: Management and General Offices,	657 86
Foreign Agency and Advertising,	173 61
Station Service,	3,113 03
Stationery,	405 12
Conductors, Baggagemen and Brakemen,	1,938 89
Train and Station Supplies,	807 00
Engineers, Firemen and Wipers,	1,554 48
Oil and Waste,	847 44
Fuel,	1,919 50
Damage to Property,	
Loss and Damage of Freight and Baggage,	93 19
Personal Injuries,	
Legal Expenses,	
Car Service,	
Miscellaneous Expenses,	88 74
Animals Killed,	244 00
Telegraph,	43 57

OTHER EXPENSES.

Interest and Exchange,	
New York Office Expenses,	
Taxes, U. S.,	775 35
Renewal of Track,	
New Buildings,	292 91
Total Expenses,	$27,416 17

RECAPITULATION.

Gross Earnings,	$31,678 33
Total Expenses,	27,416 17
Net Earnings,	4,262 16

AUDITOR'S OFFICE, Milwaukee, December 20th, 1864.

J. P. WHALING, *Chief Clerk.*

Filed January 23, 1865. by D. W. KEYES.

UNITED STATES OF AMERICA, } ss.
DISTRICT OF WISCONSIN. }

I, A. Scott Sloan, Clerk of the Circuit Court of the United States of America, for the District of Wisconsin, do hereby certify that I have compared the writings annexed to this certificate, and they are true copies of their respective originals, and are correct transcripts therefrom, and of the whole thereof, now on file, and remaining of record in my office, and being the Monthly Statements of the earnings of the Eastern Division of the La Crosse & Milwaukee Railroad so called, for the months of September, October and November, 1864, filed by Hans Crocker, Esq., Receiver of said Eastern Division.

In Testimony Whereof, I have hereunto set my hand and duly affixed the Seal of the said Court at the City of Milwaukee, in the said District of Wisconsin, this 23d day of January, in the year of our Lord one thousand eight hundred and sixty-five, and of the Independence of the said United States the eighty-ninth.

(*Seal.*)

A. SCOTT SLOAN, *Clerk.*
by James McFarlin, *Deputy.*

1639

Judge Todd's

Supreme Court of the United States.

No. 379.

THE MILWAUKEE & MINNESOTA R. R. CO.,
Appellant,

vs.

JAMES T. SOUTHER and SHEPHERD KNAPP, Survivors of Edward D. Peacock, dec'd, and others.

BRIEF FOR APPELLANT.

MATT. H. CARPENTER,
Counsel.

Gibson Brothers, Print., cor. 6th & D Sts., Washington.

1643

Supreme Court of the United States.

No. 279—December Term, 1864.

THE MILWAUKEE & MINNESOTA RAILROAD COMPANY, Appellant,

vs.

JAMES T. SOUTTER AND SHEPHERD KNAPP, Survivors of Green C. Bronson, Dec'd., and others.

Appellant's Brief.

Bronson, Soutter and Knapp exhibited in the District Court of the United States for the District of Wisconsin in equity, on the 5th day of December, 1859, their bill of complaint against the La Crosse & Milwaukee Railroad Company, the Milwaukee & Minnesota Railroad Company, and others, to foreclose what is called the Land Grant Mortgage on the Western Division of the La Crosse & Milwaukee Railroad. This cause passed to a final decree of foreclosure and sale, January 13, 1862, in the district court, and the decree was executed by a sale on the 25th day of April, 1863, neither party having appealed and given bond for *supersedeas* as required by law. The record of the principal suit is now before this court in cause 371, of the calendar of this term.

This suit was commenced by the Milwaukee & Minnesota Railroad Company exhibiting its bill of complaint, in the circuit court, *in the nature of a supplemental bill*, to have its rights declared under the decree in the original cause; and to complete certain litigation left undetermined by the decree in the original cause. This bill was demurred to in the court below, the demurrer was sustained, and the Milwaukee & Minnesota Railroad Company, *the complainant in the supplemental bill*, appeals to this court.

THE MATERIAL FACTS STATED IN THE BILL, in relation to the ownership of rolling stock.

1. The road of the debtor company, was constructed from Milwaukee to La Crosse. From Milwaukee to Portage is called the Eastern Division; and from Portage to La Crosse the Western Division. These divisions were treated in the making of all the mortgages except the last or Barnes mortgage, as separate roads; although owned by the same company. Four mortgages were put upon the Eastern Division, together with its rolling stock; two upon the Western Division, with its rolling stock; and the Barnes mortgage was made to include the whole road—both divisions—and all the rolling stock owned by the company.

The first mortgage ever given was to Palmer, conveyimg the Eastern Division only, and its rolling stock.

The second a mortgage to the City of Milwaukee on a portion of the Eastern Division, and is made subject to the Palmer mortgage.

The third a mortgage upon another portion of the Eastern Division; and it is also made subject to the Palmer mortgage.

The fourth is the Land Grant Mortgage on the Western Division and its rolling stock; which was a first mortgage as to that Division and its rolling stock; and is not made subject to any other mortgage whatever.

The fifth a mortgage to Helfenstein upon a part of the Western Division and made subject to the Land Grant Mortgage.

The sixth the Bronson and Soutter Mortgage on the Eastern Division, made subject to the three mortgages on the Eastern Division, but not subject to the Land Grant mortgage in any respect although made a year afterwards.

The seventh, the Barnes Mortgage, upon both Divisions, and all the rolling stock, and expressly made subject to all the mortgages on both Divisions.

The material provisions of these respective mortgages are as follows:

First or Palmer Mortgage on Eastern Division, conveys, the Eastern Division from Milwaukee to Portage, "together with all locomotives, engines, tenders, passenger "cars, and freight cars, shop tools and machinery, now "owned or hereafter to be acquired by said company, and "in any way belonging or appertaining to said railroad now "constructed and to be constructed within the limits afore-"said" [from Milwaukee to Portage] "including all its "property, real and personal, pertaining to said railroad, "*within said limits*, and all its right, credit and franchises "*thereto* appertaining. But nothing herein contained shall "be so construed as to prevent the said [company] from "selling, hypothecating or otherwise disposing of * * any "lands *or other property* of said company not necessary to "be retained from the roadway, depots and stations, nor re-"quired for the construction or convenient use of *that* part "of said road" [from Milwaukee to Portage] "nor from "collecting moneys due said company on stock subscription "or otherwise, nor shall anything herein contained be so "construed as to prevent the said parties of the first part "from collecting and appropriating towards the con-"struction, use and repair of the remaining parts of "said road Westward towards the Mississippi River, all "stock subscriptions, donations or loans of money, lands "or other property which may have been, or may "hereafter be, made for that purpose, but said par-"ties of the first part shall have full right so to "proceed, without let or hindrance from said party of

"the second part. And the remaining portion of the "said railroad which, by the said parties of the first "part, may be so constructed, shall be held in use "by the said parties of the first part, to their own bene- "fit and behoof forever, so far as the claims of the said "party of the second part, or his successor, might other- "wise be construed as in conflict therewith. It being "distinctly understood that the conveyance made by this "Indenture is only for so much of the present or here- "after to be acquired *rights, interest, and property* of the "said company, parties of the first part, as are or shall "be vested or belong or appertain *to that part of said rail-* "*road extending from Milwaukee to Portage City* aforesaid, "and being in distance ninety-five miles."—Record, 36.

THE LAND GRANT MORTGAGE, executed December 31, 1856, conveyed "the roads of said Railroad Company "*from Madison * * to the St. Croix River; * * and from* "*Portage City to La Crosse.* * * And also, all and singu- "lar the locomotive engines and other rolling stock, and "all the other equipments of every kind and description, "*which have already been, or may hereafter be procured for* "*or used on said roads, or either of them*, and all the "materials, tools, implements, utensils, and other per- "sonal property, which have been, or may hereafter *be* "*procured for or used in connection with said roads, or either* "*of them;* and also, all and singular the rights, liberties, "privileges, and franchises of said Railroad Company, of "every kind and description, *relating to said roads.*"— Record, 47.

This mortgage is not declared subject to any other mortgage, as to the rolling stock or anything else.

THE BRONSON & SOUTTER MORTGAGE, executed nearly a year after the Land Grant Mortgage, viz., August 17, 1857, conveyed the Eastern Division from Milwaukee to Portage; *also* the road from Watertown to Midland. * *

"And also, all and singular the locomotive engines, and "other rolling stock, and all the other equipments of every "kind and description, *which have already been or may here-* "*after be procured for, or used on, said Railroads, or either* "*of them;* and all the materials, tools, implements, and "utensils, and other personal property, which have been or "may hereafter be procured for or used in connection *with* "*said railroads, or either of them:* and also all and singular "the rights, liberties, privileges, and franchises of said "Railroad Company, so far as they relate to said Railroads "from Milwaukee to Portgage City, and from Watertown, "by way of Columbus, to Midland aforesaid; and it is "hereby declared to be the intention of the parties to these "presents to convey to and vest in said parties of the sec- "ond part all the property real and personal, of said Rail- "road Company, to be acquired hereafter, as well as that "which has already been acquired, together with all the "rights, liberties, privileges, and franchises of said Railroad "Company, *in respect to said Railroad from Milwaukee to* "*Portage City, and from Watertown, by the way of Colum-* "*bus, to Midland,* as fully and amply as the same might be "conveyed, if said Railroads had already been fully con- "structed and equipped.

"*Said Railroad from Milwaukee to Portage City is subject* "to a first mortgage on the same, of ten thousand dollars "per mile, amounting in the aggregate to nine hundred "and fifty thousand dollars; *the first eighteen miles* of said "road from Milwaukee Westward, is subject *to a second* "*mortgage* of one hundred and fourteen thousand dollars; "*and the next forty miles* of said road westward, of the "eighteen miles, is subject *to a second mortgage* of two hun- "dred thousand dollars."—Record, 52.

This mortgage makes no mention of the Land Grant Mortgage as a prior incumbrance upon any part of the premises, road or rolling stock.

THE MORTGAGE TO HELFENSTEIN upon a portion of the *Western Division*, rolling stock, etc., is *subject to the Land Grant Mortgage.*

Then the Barnes Mortgage on the whole road and all the rolling stock of the company is made expressly subject to all these prior mortgages.—Record, 18, 19.

An examination of these mortgages leaves no doubt that all except the last were made upon separate property entirely. Four of them covering the Eastern Division with the rolling stock pertaining to that division; two covering the Western Division and the rolling stock pertaining to that division; and the last, Barnes' mortgage, covering both divisions and all the rolling stock upon both Divisions.

2. The Barnes Mortgage having been first foreclosed, the purchaser, the Milwaukee and Minnesota Railroad Company became the owner of the whole road, and all the rolling stock belonging to both Divisions subject among others to the lien of the Land Grant Mortgage upon the Western Division and its rolling stock; and the Bronson and Soutter Mortgage upon the Eastern Division and its rolling stock.

R. Stat. Wis., 1858, Ch. 77, Sec. 33.
Chap. 10, Gen. Laws 1859.
Murphey v. Farwell 9 Wis. 102.
Allen v. Case 13 Wis. 621.

The only question now made is as to what was included in and conveyed by the Land Grant Mortgage. In obstinate defiance of the clear adjudications of the court, it is now maintained that the Land Grant Mortgage was both a first and second mortgage. A first lien upon the Western Division and its rolling stock, and a second mortgage upon the rolling stock pertaining to the Eastern Division; and that the orders, decree and proceedings in the Land Grant foreclosure cause have been so artfully involved

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and darkened that no one thing is plain, except that the Milwaukee & St. Paul Company own everything, except the road bed of the Eastern Division.—Record, 14.

Two suits were commenced in the District Court of the United States at about the same time; one to foreclose the Land Grant Mortgage on the Western Division and its rolling stock; the other to foreclose the Bronson and Soutter Mortgage on the Eastern Division and its rolling stock.

This bill states the character of these two causes as follows:

"Your orator further shows that in the said suit commenced to foreclose the said mortgage upon the said Western Division, no persons or corporations were made parties defendant, except those having or claiming to have an interest in or incumbrance upon the said Western Division; and that in the said suit commenced to foreclose the said mortgage upon the said Eastern Division, no persons or corporations were made parties, except those having or claiming to have some interest in or lien upon the said Eastern Division; and that in neither of the said suits did the said complainants therein pray or claim any relief as against the complainants in the other suit; but the said two foreclosure suits were in all respects, and in every particular, separate and independent suits, as the respective mortgages, which they respectively were exhibited to foreclose, were separate and distinct mortgages upon separate and distinct premises.

"Your orator further shows that neither the said mortgage upon the Western Division, nor the said mortgage upon the Eastern Division, pretended to enumerate, specify or particularly describe the amount of rolling stock intended to be thereby conveyed; and that in neither of the suits commenced to foreclose said respective mortgages, did the bill of complaint pretend to state, enumerate, or describe the precise rolling stock, or

amount of rolling stock included or intended to be included in and conveyed by the mortgage which it was exhibited to foreclose, or which belonged thereto at the time said bill was exhibited. But your orator, as owner of the equity of redemption of the said Western Division, and the rolling stock and franchises pertaining thereto, was made a party defendant to the said bill of complaint, which was exhibited to foreclose the said mortgage on the Western Division; and your orator in the said Western Division mortgage foreclosure suit, and as against the complainants in that suit, *was the owner of and entitled to reserve, claim and have all the railroad rolling stock and franchises which had belonged to said debtor company, except that which was included in and encumbered by the said Western Division mortgage.* And your orator, as the owner of the equity of redemption of the said Eastern Division and rolling stock and franchises pertaining thereto, was made a party defendant to the bill of complaint in the suit commenced to foreclose the said Eastern Division mortgage; and in that suit, and as against the complainants in that suit, your orator was the owner of and entitled to claim, reserve and have all the railroad, rolling stock and franchises which had belonged to the said debtor company, except that which was encumbered by and included in the Eastern Division mortgage."—Record, 6, 7.

The Milwaukee & St. Paul Company claim, as purchasers at the sale under the Land Grant Decree; and their rights are only to be determined by that decree and the previous proceedings in that cause. No adjudications in the other cause could affect the rights of the parties to the Land Grant foreclosure suit; but as it is claimed that the orders and decrees in the Land Grant cause were made purposely ambiguous to aid the St. Paul Company to claim what never was intended to be covered by that mortgage, it is proper to refer to the orders and decrees made in both causes at the same time as explanatory of

the intention and meaning of the court in the particular language employed. I shall therefore give these various orders side by side, for convenience in comparison.

At the hearing of the two causes, which were heard and decided together, the district judge delivered a written opinion. I extract all that relates to the question of the rolling stock, viz:

OPINION OF COURT AS TO ROLLING STOCK.

"The legislation of this State was evidently with a view "of enabling railroad companies, and especially the La "Crosse & Milwaukee Railroad Company, to raise money "in advance by bond and mortgage, for the purpose of "building their road and procuring rolling stock. The "directors of this company were given almost unlimited "license to make bonds and mortgages payable in any "manner they might deem proper, and to pledge or "mortgage their property as security. By the terms of "the mortgages the rolling stock to be procured was "pledged to secure the debt contracted for raising the "means for its procurement.

"In equity those pledges should be sustained, and per- "sons who purchased the Company's bonds, and fur- "nished the means for procurement of the stock should "be protected.

"And they also furnished the means for building the "road, from which revenues have been derived to enable "the Company to procure the rolling stock.

"From the best consideration I can give the subject, "*I think the rolling stock on the whole road is to be considered* "*to be a fixture, and is pledged to the first mortgage of nine* "*hundred and fifty thousand dollars, unless it can be shown* "*affirmatively how much or what portion was procured by* "*funds received out of the issue of Land Grant bonds, and* "*the second mortgage bonds, or either of them.*

"*So much of the stock as can be shown to have been pro-* "*cured out of either of those issues, or out of the revenues of so*

"*much of the road as was built with funds arising out of those "issues of bonds respectively, will pass with the sales on said "mortgages.*"

For the entire opinion, see Record No. 280, p. ~~217~~ 237.

This opinion determines that the rolling stock is all to be regarded a *fixture upon the Eastern Division*, and all covered by the first mortgage, except that which was purchased with the money received on the issue of the Land Grant bonds, which would be considered *as a fixture upon the Western Division.* The language of the opinion is, that it is "*pledged to the first mortgage.*" Turning to the record, it will be seen that nothing was pledged to that mortgage but the rolling stock pertaining to that division, everything else being excluded by the most unambiguous terms.—Record, 36.

After the delivery of this opinion, and on the same day, orders of reference were made in the two cases as follows:

WESTERN DIV. CAUSE.

"And it is further ordered that the said masters ascertain and report the whole amount of rolling stock on the road, and that they specify the quantity thereof that is covered by and included in this mortgage, and also in the first and second mortgages respectively."—Record, 72.

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"And it is further ordered by the court that the said masters ascertain and report the whole amount of rolling stock on the whole road, and that they specify the quantity thereof *that is covered by and included in* the first mortgage, and also in this mortgage, and in the mortgage of Greene C. Bronson, James T. Soutter, and Shepherd Knapp."—Record, 89.

These orders of reference are to be read in the light of the preceding opinion. *Now what was the object to be attained by them?*

Take, for instance, the order in the Western Division cause, for what purpose was it made?

Manifestly not to ascertain the priorities of the Land Grant and the Bronson & Soutter mortgages as to the rolling stock; because, as the trustees of the Eastern Division mortgage were not parties, *no such thing could be determined.* The District Court must be deemed to have

had a practical end in view, which it had the jurisdiction to accomplish in that cause. The answer is obvious. The complainants in this Western Division cause had made the Milwaukee & Minnesota Railroad Company, the owner of the equity of redemption, a party defendant to their bill. It was therefore important to determine what amount of the whole rolling stock was included in the Land Grant Mortgage; because the Milwaukee & Minnesota Railroad Company, after the decree and sale, would remain the owner of all the rolling stock on the whole road, except that which was covered by the Land Grant Mortgage; and being a party defendant, it would be bound by the determination of that question. It was the duty of the court to settle this question *as between the parties to the cause* before ordering a sale. Otherwise it would have been selling a speculation, and not property the title to which it had ascertained.

Caldwell v. Taggart 4 *Pet.* 190, 201.

The language of the order is also decisive of this question. The masters are directed to ascertain how much of the whole rolling stock "is covered by and included in *this* mortgage, [the Land Grant Mortgage] and in the first and second mortgages, [the Palmer and the Bronson and Soutter Mortgages] *respectively.*" The word *respectively* implies separation, distribution, between the two divisions. Bear in mind, the Palmer Mortgage and the Bronson and Soutter Mortgage, conveyed the rolling stock pertaining to the Eastern Division only; the Land Grant Mortgage conveyed only the rolling stock pertaining to the Western Division; but neither of the mortgages defined the amount or gave the description, by which it could be determined how much each mortgage covered. The order therefore was made to determine in the Land Grant cause, and as between the parties to it, how much of the rolling stock pertained to the Western Division, and how much belonged to the Eastern Divi-

sion. *What one mortgage covered the other did not.* For it is absurd to say that the Land Grant Mortgage, which conveyed only the Western Division and the rolling stock "*pertaining*" *to that division*, also covered rolling stock which pertained to, and "was to be regarded as a fixture" upon the Eastern Division. Hence, the language of this order is equivalent to saying, divide this rolling stock by ascertaining how much belongs to the Eastern Division, and hence is included in the Palmer and Bronson and Soutter Mortgages; and how much of it belongs to the Western Division and is included in the Land Grant Mortgage.

Who in this court will have the face to say that His Honor the District Judge intended a thing totally different from what he said; and this too for the purpose of making out that he was trying to do something *entirely beyond his jurisdiction to accomplish, to adjudicate upon the rights of persons not parties to the cause.*

To these orders of reference the masters answer as follows:

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"We have also ascertained the whole amount of rolling stock on the whole road at the cost price. The amount thereof was, at the date of the filing of the bill of complaint in this cause, five hundred and sixty-nine thousand six hundred thirty-five dollars and seventy-eight cents, and an additional amount of fifty three thousand six hundred dollars has been purchased since the filing of the bill of complaint, making the whole amount to $623,235 78.

"And we have ascertained, and do further report, that of the said rolling stock, forty box cars, amounting, at the cost price thereof, to thirty-one thousand nine hundred and seventy-nine dollars, and sixty-four cents, and numbered 330, 332, 334, 336, 338, 340, 342, 342, 344, 346, 348, 350, 352, 354, 356, 358, 360, 362, 364, 366, 368, 370, 372, 374, 376, 378, 380, 382, 384, 386, 388, 390, 392, 394, 396, 398, 400, 402, 404, 406, and 408, are covered by and

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"We have also ascertained the whole amount of rolling stock on the whole road. The amount thereof, at the cost price, was at the date of filing the bill of complaint in this cause, five hundred sixty-nine thousand six hundred and thirty-five dollars and seventy-eight cents. And an additional amount of fifty-three thousand six hundred dollars has been purchased since the filing of the bill of complaint, making the whole amount now on the road, six hundred twenty-three thousand two hundred thirty-five dollars and seventy-eight cents, ($623,235 78.)

"And we have ascertained, and do further report, that of the said rolling stock, forty box cars, amounting, at the cost price thereof, to thirty-one thousand nine hundred and seventy-nine dollars and sixty-four cents, ($31,979 64,) and numbered 330, 332, 334, 336, 338, 340, 342 344, 346, 348, 350, 352, 354, 356, 358, 360, 362,

included in the mortgage executed to the complainants as set forth in the bill of complaint in this cause, the said cars having been purchased, by the proceeds of a portion of the bonds to which this mortgage is collateral, and all the remainder of the said rolling stock is covered by and included in the first mortgage upon the said railroad, and in the mortgage upon the said railroad executed to Greene C. Bronson and James T. Soutter, and bearing date on the seventeenth day of August, A. D. 1857."—Record, 72.

364, 366, 368, 370, 372, 374, 376, 378, 380, 382, 384, 386, 388, 390, 392, 394, 396, 398, 400, 402, 404, 406, and 408, are covered by and included in the mortgage of Greene C. Bronson, James T. Soutter, and Shepherd Knapp, and no other. And all the remainder of the said rolling stock is covered by and included in the first mortgage upon the said railroad, and in the complainants' mortgage specified in the bill of complaint."—Record, 90.

These two reports, made by the same masters on the same day leave no doubt as to their meaning, and what they had ascertained. It is impossible to employ language more free from ambiguity; forty box cars "are covered by and included in" the Land Grant Mortgage. "The said cars having been purchased by the proceeds of a portion of the bonds to which this mortgage is collateral;" following the principle laid down in the previous opinion of the judge; "and *all* the remainder of the said rolling stock is covered by and included in" the Eastern Division Mortgages. This is the report in the Western Division Cause. In the Eastern Division cause the report is the same, though the masters have made it more emphatic by reporting that the Land Grant Mortgage covers forty box cars "and no other" of the rolling stock. The report in the Western Division cause is the same that it would be, had the masters reported in the same phraseology, that "no other" of the rolling stock than the forty box cars was covered by that mortgage. What was covered by one mortgage, was not covered by the other; and when they reported that forty box cars belonged to one mortgage, "and all the remainder" to the other division mortgages; the addition of the words "no other" to each sentence would not make the sense clearer. Such addition gives emphasis and belongs to rhetoric, but adds nothing to the clearness of the assertion.

But if it is possible to add anything to what has been done by the order of reference and the report of the mas-

ters, it is found in the exceptions taken by the respective parties to these respective reports. In the Eastern Division cause the complainants claimed that they hold all the rolling stock. They were therefore dissatisfied that the masters had given forty box cars to the other Division. In the Western Division cause the complainants claimed all the rolling stock, and were dissatisfied that the masters had given them only forty box cars. In both causes therefore the complainants excepted to the report as follows:

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"4th. For that the said master and special masters have in and by their said report certified that all the rolling stock on said road (except 40 box cars which are specially named in said report) *was covered by and included in the first mortgage* upon the said railroad, *and in the mortgage upon the said railroad executed to Greene C. Bronson and James T Soutter*, and bearing date on the 17th day of August, A. D. 1857.

"Whereas the said master and special masters ought to have certified that all the rolling stock on said road (except that purchased by the receiver since the commencement of this suit, amounting to the sum of fifty-three thousand six hundred dollars) was covered by *and included in the mortgage given* to the said complainants, and described in the bill of complaint in this cause, and that said mortgage was a first and prior lien on said rolling stock, superior to all other liens; and that as to the rolling stock purchased by said receiver above mentioned, 105-200 thereof was covered by the mortgage described in the complaint, and that to that extent the complainants' said mortgage was a first lien thereon."—Record, 75.

EASTERN DIV. CAUSE.

"19th. For that the said masters, in their said report, have certified that of the rolling stock forty box cars, amounting at the cost price thereof to thirty-one thousand nine hundred and ninety-nine dollars and sixty-four cents, and numbered 330, 332, &c., &c., *are covered by and included in the mortgage to Greene C. Bronson, James T. Soutter and Shepherd Knapp, and no other;* whereas the said masters should have certified *that the said rolling stock was covered by and included in the mortgage of the complainants* in this action."—Record, No. 132, last term, p.

It is manifest that the complainants in these causes, while they differed upon the question as to how much of the rolling stock was "included in and covered by" their respective mortgages; nevertheless agreed in this, *that what "was included in and covered by" one mortgage, was not "included in and covered by" the other.* The complaint that is made by each of these exceptions is, that what the

party excepting claimed to hold had been decided by the master to be *included in the other mortgage.*

Take now the exception in the Western Division cause, as that is really the only one that is material here.

The exception complains that the masters have reported, that all but forty box cars "was covered by and included in the first mortgage," &c. And this is the only objection taken to what they *did report.* How were the complainants affected by this report, except upon the ground that what was included in the first mortgage belonged to the Eastern Division, and consequently was not covered by their mortgage, which only held the rolling stock belonging to the Western Division.

Mr. Cary now claims that all the rolling stock *was* included in the first mortgage, *and in his also;* and that his mortgage is a subsequent lien, &c., the first mortgage being the prior lien upon the rolling stock. Had he entertained this idea when this exception was drawn, he would have excepted *for that* the masters had reported that the rolling stock, except the forty box cars, was covered by the first mortgage only; whereas they ought to have reported that it was also included in the Land Grant Mortgage as well as in the first mortgage.

The exception then says the masters ought to have done two things, which they had not done; that is (1) "certified that all the rolling stock * * *was covered by and included in the Land Grant Mortgage.*" The addition of the words "and that said mortgage was a first and prior lien on said rolling stock, superior to all other liens," adds nothing to what preceded; because *if it was included* in that mortgage, all conceded and still concede that mortgage to have been the first lien upon it. The question is *whether it was included in that mortgage at all;* not, what is the effect of the mortgage upon it, *if it was included.* And (2) that of the rolling stock purchased by the Receiver 105-200 thereof was covered by the Land Grant Mortgage.

After the argument of these exceptions, the court delivered its opinion in writing, adhering to the principles of its former opinion. I quote all that relates to this subject.

OPINION OF THE COURT BELOW AS TO ROLLING STOCK.
(From page 251 of printed Record No. 280.)

"In obedience to the order of reference, the masters "enquired into the quantity of rolling stock covered by "this mortgage. *They report that forty box cars*, costing "thirty-one thousand nine hundred and seventy-nine "dollars and sixty-four cents, giving their respective num- "bers, *were purchased with funds raised on the bonds in this "mortgage*. They also report that the rolling stock on "the road cost $623,235.28, *and that all but those box cars "are covered by the first and second mortgages*. The com- "plainants except to this part of the report, *and claim the "whole rolling stock. They found their claim upon the grounds "that the rolling stock is personal property*, and that the first "mortgage was not filed as a chattel mortgage, and is "therefore void as to the rolling stock, and that their "mortgage was the first in date after the act of October "10, 1856, declaring the rolling stock to be real property. "I do not think the statute for filing chattel mortgages is "applicable to this species of property in actual use upon "a railroad.

"The legislation of this State was evidently with the "view of enabling railroad companies, and especially the "La Crosse and Milwaukee Railroad Company, to raise "money in advance by bonds and mortgage for the pur- "pose of building their roads and procuring rolling stock. "The directors of this company were given almost unlim- "ited license to make bonds and mortgages payable in "any manner they might deem proper, and to pledge or "mortgage their property as security. By the terms of "the mortgages the rolling stock to be procured was

"pledged to secure the debt contracted for raising the "means of its procurement. In equity those pledges "should be sustained, and the persons who purchased the "company's bonds and furnished the means for the pro- "curement of the stock should be protected. And they "also furnished the means for building the road, from "which revenues have been derived, to enable the com- "pany to procure rolling stock. This matter is fully "settled as authority to this court in the case of Pennock "vs. Coe, 23 Howard, 117. The rolling stock was pro- "cured by the company as owners, and was fitted and "adapted to the road as the means of operating it; and "so long as it is thus used, it should be considered as "fixtures, even without statute law. The first mortgage "covered all the after acquired rolling stock, except such "as should be proven to have been purchased with funds "raised upon subsequent mortgages. To that extent those "mortgages should have a superior equity. For these "reasons the exception will be overruled. *But the decree "will, in addition to the forty cars reported by the masters, al- "low to this mortgage its share of all the rolling stock purchased "and procured by the Receiver, costing* $147,942, in propor- "tion to the net revenues.

"Before the appointment of the Receiver the revenues "of the west end of the road did not more than cover "operating expenses. Since then they have so increased "as to entitle these bond-holders to a proportion of the "rolling stock procured by the Receiver. *It does not ap- "pear that any of the avails of the second mortgage bonds were "applied to the purchase of rolling stock.*"

This opinion shows precisely what claim was made by the complainants in the court below in regard to the rolling stock, and the ground of that claim. After stating the report, as to rolling stock, viz: that only forty box cars were covered by the Land Grant Mortgage, because they "were purchased with funds raised on the bonds in "this mortgage;" the court says, "The complainants ex-

"cept to this part of the report, *and claim the whole rolling "stock*. They found their claim upon the grounds that "the rolling stock is personal property, and that the first "mortgage was not filed as a chattel mortgage and is "*therefore void as to the rolling stock*, and that their mortgage "was the first in date after the act of October 10, 1856, "declaring the rolling stock to be real property. I do not "think the statute for filing chattel mortgages is applica- "ble to this species of property in actual use upon a rail- "road." For these reasons the court overruled the exception.—Record No. 280, p. 251. Here was no claim that the Land Grant Mortgage was a second mortgage as to the rolling stock pertaining to the Eastern Division; but that the first mortgage *was void* as the rolling stock, that is, did not include it at all; and the Land Grant Mortgage was a *first mortgage* upon all the rolling stock.

The court in its opinion—Record No. 280, p. 251—also states why the Land Grant Mortgage should be deemed to cover a proportion of the rolling stock purchased by the Receiver, and no part of that which was on the road when the Receiver was appointed. The court says, "Before "the appointment of the Receiver the revenues of the west "end of the road did not more than cover the operating "expenses. Since then they have so increased as to enti- "tle these bond-holders to a proportion of the rolling stock "procured by the Receiver. It does not appear that any "of the avails of the second mortgage bonds were applied "to the purchase of the rolling stock." From this opinion, then it resulted, logically and necessarily that all the rolling stock on the road when the receiver was appointed, except the specified *forty box cars*, was to be regarded as fixture upon the Eastern Division, that the rolling stock purchased by the Receiver should be divided between the two divisions in proportion to their respective net earnings; and that the second, or Bronson & Soutter Mortgage, should not be allowed to cover any of the rolling stock, because none of the bonds secured by that mortgage, had

been used for the purchase of rolling stock. And on the same day this opinion was delivered, January 7, 1862, the court made orders in the two cases, in accordance with the opinion, as follows:

WESTERN DIVISION CAUSE.

"This day came the parties, by their counsel, and on consideration of the several exceptions to the report of the masters, and the arguments of counsel, it is ordered by the court that the first, second and third exceptions of complainants to said report be, and hereby are, overruled.

And it is further ordered by the court *that the fourth exception* of complainants be, and is hereby overruled, except as to the forty box cars *which are* covered by this mortgage. And it is further ordered by the court that on said exception the said report be so modified that *all the other stock* that was on said road when the receiver was appointed, *except the said forty box cars, is covered by and included in the first mortgage of the road from Milwaukee to Portage City;* and that all the rolling stock on said road that has been purchased or procured since the court has held possession by its receiver, costing $147,943 62, be applied to the *said first mortgage*, and *the mortgage in this bill*, in proportion to the net revenues on such portions of the road said mortgages respectively covered, since the appointment of the receiver."—Record, 78.

EASTERN DIVISION CAUSE.

"This day came the parties by their counsel, and on consideration of the exceptions of the parties to the report of the masters, and of the arguments of counsel, it is thereupon ordered by the court that all the several exceptions of complainants to said report be, and hereby are overruled. * *

"And it is further ordered by the court that the report of the masters, allowing forty box cars to be covered by the Land Grant Mortgage of said company to Bronson, Soutter and Knapp, be, and hereby is, confirmed. And that the said report be so modified that all the other rolling stock that was on said road when the receiver was appointed, except the said forty box cars, is covered by and included in the first mortgage of the said company from Milwaukee to Portage City. And that all the rolling stock on said road that has been purchased or procured since the court has had possession by its receiver be applied *pro rata*, in proportion to the revenues of the road, to the first said mortgage and the said Land Grant Mortgage."—Record, 94.

These several documents, the order of reference, the report of the masters, the exceptions to that report, and order of the court upon the exceptions must be considered together for each after the first is an answer to the one which preceded it; and each is to be construed in the light of what preceded it, as an answer by letter is always to be explained by the letter to which it is a reply.

And these documents which are of record, are as unambiguous as the opinion, and conduct to the same result.

The fourth exception taken by the counsel for the Land

Grant Mortgage contains these words, "Whereas the said "masters ought to have certified that *all the rolling stock* on "said road (except that purchased by the Receiver) *was* "*covered by and included in the mortgage given to the said* "*complainants*, and described in the bill of complaint in "this cause," to this the court replies, "and it is further "ordered by the court that the *fourth exception* of the com- "plainants *be and is hereby overruled*, except as to the forty "box cars *which are* covered by this mortgage." Can it be contended for a moment, that after the exception which *contained this claim* on the part of the Land Grant Mortgage had been *overruled*, that mortgage can still claim to cover "*all the rolling stock.*" The whole of this *fourth exception* is overruled (except the claim to the forty box cars:) no pretention set up in it is admitted: even the division of that portion purchased by the Receiver, as claimed by the counsel, is denied, and a different division ordered—the court *denies the claim* that the Land Grant Mortgage *covers all the rolling stock*: and thus denies that it is "*a first and prior lien, superior to all other liens:*" it denies that it covers 105-200 *of the portion purchased by the Receiver*—it says "The fourth *exception is overruled except* "*as to the forty box cars.*" Thus the whole claim on behalf of the Land Grant Mortgage is swept away.

The court having in each of these causes determined the precise amount of the rolling stock which was covered by the respective mortgages, decrees were made in both causes January 13, 1862. The decrees are in the ordinary form and immaterial here, except in the description of the premises ordered to be sold; and in that respect they are as follows:

WESTERN DIVISION CAUSE.	EASTERN DIVISION CAUSE.
DECREE.	DECREE.
The description of the property authorized to be sold under and by virtue of this decree, so far as the same can be ascertained from the mortgage above referred to or from	The description of the property authorized to be sold under and by virtue of this decree, so far as the same can be ascertained from the mortgage above referred to, or from

the bill of complaint in this cause, is as follows, viz:

"All and singular the several tracts, pieces or parcels of land which now are, or may hereafter be or constitute the site of the roadway, turnouts, engine houses, work shops, depots, and other buildings, and all the other lands and real estate which now constitute or may hereafter constitute, or be a part of the roads of said railroad company from Madison, by way of Portage City, to the St. Croix river or lake, between townships twenty-five and thirty-one, and from Portage City to La Crosse; and also all and singular the superstructure of said road, whether now made or to be made hereafter. And all the engine houses, work shops, depots, and other buildings, and all the other improvements on or pertaining to said roads, whether now built and made, or to be built and made hereafter. And also all and singular the locomotive engines and other rolling stock, and all the other equipments of every kind and description, which have already been, or may hereafter be, procured for or used on said roads, or either of them, and all the materials, tools, implements, utensils, and other personal property, which have been or may hereafter be, procured for or used in connection with said roads, or either of them. And also all and singular the rights, liberties, privileges and franchises of said railroad company of every kind and description relating to said road."

Also "all and singular the lands granted or intended to be granted to said railroad company, under or by virtue of the act of Congress and the act of the legislature of Wisconsin hereinbefore mentioned, so far as the said lands pertain or are applicable to the construction of said roads from Madison by way of Portage City, to the St. Croix river or lake, estimated to be about one million of acres of land, together with all and singular the hereditaments and appurtenances belonging or in anywise appertaining to the lands and real estate hereby conveyed or intended to be conveyed; and it is hereby declared to be the intention of the parties to these presents to convey and to vest in said parties of the second part all the property,

the bill of complaint in this cause, is as follows, viz:

"All and singular the railroad of said company, commencing in the city of Milwaukee and running thence to Portage City, a distance of ninety-five miles, which road has been constructed and is now in full operation; and also the railroad of said company, (as well that part which has been constructed as that part which remains to be constructed,) from Watertown, by the way of Columbus, to Midland, (where it connects with the main line of the railroad of said company,) a distance of forty miles, one-half of which last mentioned road, being the part between Watertown and Columbus, has been constructed and is now in full operation, including all and singular the several tracts, pieces or parcels of land which now are, or may hereafter be, or constitute the site of the roadways, turnouts, engine houses, work shops, depots, and other buildings and all the other land and real estate which now constitute or may hereafter constitute or be a part of or appertain to said railroads or either of them. And also all and singular the superstructure of said railroads, whether now made or to be made hereafter, and all the engine houses, workshops, depots and other buildings, and all the other improvements on or appertaining to said railroads, or either of them, whether now built or made, or to be built and made hereafter.

And also all and singular the locomotive engines, and other rolling stock, and all the other equipments of every kind and description which have already been or may hereafter be procured for or used on said railroads or either of them; and all the materials, tools, implements and utensils, and other personal property which have been or may hereafter be procured for or used in connection with said railroads or either of them.

And also all and singular the rights, liberties, privileges and franchises of said railroad company, so far as they relate to said railroads, from Milwaukee to Portage City, and from Watertown, by the way of Columbus, to Midland, aforesaid.

And it is hereby declared to be the intention of the parties to these pres-

real and personal, of said railroad company to be acquired hereafter, as well as that which has already been acquired, together with all the rights, liberties, privileges, and franchises of said railroad company, in respect to the roads above mentioned, as fully and amply as the same might be conveyed if the said railroads had already been fully constructed and equipped, and the particular lands granted by the foregoing act of Congress and the legislature, so far as the same are applicable to the construction of said road from Madison to St. Croix river or lake, had already been designated and conveyed to said railroad company."

With forty box cars, numbered 330, 332, 334, 336, 338, 340, 342, 344, 346, 348, 350, 352, 354, 356, 358, 360, 362, 364, 366, 368, 370, 372, 374, 376, 378, 380, 382, 384, 386, 388, 390, 392, 394, 396, 393, 400, 402, 404, 406, and 408, and such portion or share of rolling stock purchased and procured by the receiver, costing one hundred and forty-seven thousand nine hundred and forty-two dollars and sixty-three cents, as the net revenues of the portion of road covered by this mortgage bears to the balance or other end of the road since the appointment of the receiver.

The remaining rolliny stock is subject to prior mortgages.—Record, 78.

ents to convey to and vest in said parties of the second part, all the property, real and personal, of said railroad company, to be acquired hereafter, as well as that which has already been acquired, together with all the rights, liberties, privileges and franchises of said railroad company in respect to said railroads from Milwaukee to Portage City, and from Watertown, by the way of Columbus, to Midland, as fully and amply as the same might be conveyed if said railroads had already been fully constructed and equipped. Said railroads from Milwaukee to Portage City is subject to a first mortgage on the same of ten thousand dollars per mile, amounting in the aggregate to nine hundred and fifty thousand dollars: the first eighteen miles of said road from Milwaukee, westward, is subject to a second mortgage of one hundred and fourteen thousand dollars; and the next forty miles of said road, westward of the eighteen miles, is subject to a second mortgage of two hundred thousand dollars.—Record, 95.

On a former argument of this question, it was claimed by Mr. Cary that this quotation from the mortgage in the decree in the Land Grant cause amounted to a direction to sell all the rolling stock on the whole road; and that the forty box cars being specifically ordered to be sold; the closing sentence of the decree meant as to all but the forty box cars the Land Grant mortgage was a subsequent lien.

1. If the decree were to be taken independent of all former proceedings in the cause this general language quoted in the decree would mean there precisely what it meant in the mortgage, and would include no more; and I have already shown that in the mortgage, *it covers only the rolling stock* pertaining the Western Division. And with-

out aid from the prior proceedings, it is submitted that this language in a decree would convey nothing, but would be utterly void for uncertainty; or at the least would require supplementary suit to determine what was included in the description.

A mortgage conveying "all the real estate I now own in Milwaukee," might be a good mortgage. But if a bill were exhibited to forclose it, it would have to show that when I executed the mortgage, I was owner of *certain* real estate; and then the decree would be, not to sell all the real estate I owned at the making of the mortgage; but the real estate by exact and certain description, which the court had determined, I did own.

2. But a plainer answer to this argument is, that the decree is only a part of the proceedings in the cause. What was vague and uncertain in the mortgage, was rendered definite and certain by the reference, report, and order of court thereon. Suppose in the decree after reciting that in the mortgage the premises were described thus and so, giving a quotation from the mortgage; the court had also recited that for the purpose of ascertaining how much rolling stock was included in this general description, reference had been made to masters, who had reported that only forty box cars were included, and the court on exceptions, had confirmed the report. This would have made the matter entirely clear. Now it is submitted that those former proceedings have the same effect in the cause, upon the rights of the parties, as if they had all been repeated in the decree. This is precisely why, if you wish to introduce a decree in evidence in any other cause, you must produce not the decree only, but a transcript of the whole proceedings; so that the court may determine what is the effect of the whole record. The court does not pretend that those general words are a proper description of what was to be sold. The decree recites a fact merely, that the premises were described in the mortgage in a certain way. This description was sufficient as to the lands, roads and

franchises; but worthless as a description of rolling stock. When the decree proceeds to order sold the forty box cars numbered 330, etc., etc., and a certain proportion of rolling stock purchased by the Receiver, and comes to a full stop, or period. Then the decree adds the adjudication *that the remaining* rolling stock is subject to prior mortgages, as the reason why only forty box cars were decreed to be sold. That the court regarded the general language quoted worthless as a direction to sell rolling stock is shown from the fact that after all that quotation, the court proceeds to direct the sale of the forty box cars, it intended to have sold. Upon the argument of Mr. Cary, that all the rolling stock was described in the general language, the court by proceeding afterwards, with its direction that this should be sold "*with forty box cars, numbered*," &c., must be deemed to have given them forty box cars in the decree not covered by the mortgage. For it is impossible not to see that the "forty box cars" are ordered to be sold in addition to what was included in the former paragraph in the decree—that is in addition to what was included in this quotation in the mortgage.

3. But a more conclusive answer still remains. In the Eastern Division cause the court had determined that no rolling stock was "included in and covered by" the Bronson and Soutter mortgage on the Eastern Division. Yet it will be seen that the decree in this cause quotes the same language from that mortgage that the land grant decree quotes from the land grant mortgage. It is manifest, therefore, that in the Eastern Division cause, the court did not intend by quoting the general description from the mortgage to order any rolling stock to be sold. And in the Eastern Division decree, the general language quoted from the mortgage is not followed, as it is in the land grant decree, with direction to sell any rolling stock. In the land grant cause, the court had determined that forty box cars were included in that mortgage; and after the general language in the decree, it ordered the forty box cars sold.

and been beaten again, appealed from the court to the marshal and succeeded *so far as that functionary was concerned.* It is equally manifest, however, from the subsequent orders of the court, that the judicial performance of the marshal was never brought to the knowledge of the court, or if it was, it was treated by the court as a mere nullity, as it undoubtedly was; and in all the subsequent orders of the court the court followed its own views and decree, regardless of the fact that the marshal had attempted to override the decree, and give to this mortgage what the masters and the court had decided was not included in and covered by it.

It appears from the report of sale that the marshal first sold what he was directed to sell; that is, the Western Division, *with forty box cars*, and *a proportion* of the rolling stock *purchased by the Receiver;* and that he then proceeded to sell the rolling stock belonging to the Eastern Division, which was not included in the mortgage, which the masters and the court had *determined* was not included in or covered by the mortgage: but *was included in and covered*

franchises; but worthless as a description of rolling stock. When the decree proceeds to order sold the forty box cars numbered 330, etc., etc., and a certain proportion of rolling stock purchased by the Receiver, and comes to a full stop, or period. Then the decree adds the adjudication *that the remaining* rolling stock is subject to prior mortgages, as the reason why only forty box cars were decreed to be sold. That the court regarded the general language quoted worthless as a direction to sell rolling stock is shown from the fact that after all that quotation, the court proceeds to direct the sale of the forty box cars, it intended to have sold. Upon the argument of Mr. Cary, that all the rolling stock was described in the general language, the court by proceeding afterwards, with its direction that this should be sold "*with forty box cars, numbered*," &c., must be deemed to have given them forty box cars in the decree not covered by the mortgage. For it is impossible not to see that the "forty box cars" are ordered to be sold in addition to what was included in the former paragraph in the decree—that is in addition to what was included in this quotation in the mortgage.

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*Because the decree was the last act the district court had jurisdiction to perform in this cause. The subsequent orders are *coram non judice*.

See brief Ex-parte Fleming, No. 5. Original docket this term.

[Omitted here by mistake.]

In the Eastern Division cause, the court had determined that no rolling stock whatever was "included in and covered by" the mortgage, and hence, after the general language there is no direction to sell any rolling stock whatever.

4. If I am right in the view I take of the proceedings in the land grant cause down to and including the decree, I need go no further. It is well settled that a sale in fact by a marshal of what he is not authorized *by the decree* to sell, *is a mere nullity—absolutely void*—although it may be confirmed by the court.

Laverly vs. Moore, 32 Barb., N. Y., 347.
Shriver vs. Linn, 2 How. U. S., 43.

It appears from the record in the land grant cause, that Mr. Cary, after having been defeated before the masters, and after having appealed from the masters to the court and been beaten again, appealed from the court to the marshal and succeeded *so far as that functionary was concerned.* It is equally manifest, however, from the subsequent orders of the court, that the judicial performance of the marshal was never brought to the knowledge of the court, or if it was, it was treated by the court as a mere nullity, as it undoubtedly was; and in all the subsequent orders of the court the court followed its own views and decree, regardless of the fact that the marshal had attempted to override the decree, and give to this mortgage what the masters and the court had decided was not included in and covered by it.

It appears from the report of sale that the marshal first sold what he was directed to sell; that is, the Western Division, *with forty box cars*, and *a proportion* of the rolling stock *purchased by the Receiver;* and that he then proceeded to sell the rolling stock belonging to the Eastern Division, which was not included in the mortgage, which the masters and the court had *determined* was not included in or covered by the mortgage: but *was included in and covered*

by the Eastern Division mortgage. This irregular conduct of the marshal was not discovered by the counsel for the Milwaukee & Minnesota Railroad Company, nor brought to the knowledge of the court by its counsel, until long after the St. Paul Company had been in possession of the whole road and rolling stock under the order of June 12, 1863.

May 5, 1863, the sale was confirmed by order of the district court in the Western Division cause, as follows:

"This day came the parties, by their counsel, and the "argument of the several exceptions to the sale of the "mortgaged premises by the marshal being concluded, it "is ordered by the court that said exceptions be, and "hereby are, overruled.

"And it is further ordered and decreed by the court, "that the said sale so as aforesaid made, be, and hereby "is, confirmed, and that the marshal make a deed to the "purchasers."—Record, 84.

On the 7th May, 1863, the St. Paul Company applied to the court to be let in possession of the Western Division and rolling stock *which it had purchased;* and also to be let into possession of the Eastern Division and rolling stock which it had not purchased; and for leave to operate the same, as well as its own division. To this petition the court that day answered by the following order:

"Whereupon it is ordered by the court (Mr. Carpenter "in behalf of the Milwaukee & Minnesota Railroad Com- "pany, and Mr. Ryan in behalf of William Crawshay and "Orville Oddie objecting) that the Receiver deliver over "to the said Milwaukee & St. Paul Railway Company the "said railroad and appurtenances between Portage City "and La Crosse, *and the rolling stock and property specially* "*described in the decree.*

"And it is further ordered by the court, that a full and "perfect inventory be taken by the Receiver of all rolling "stock *other than the forty box cars specially mentioned in* "*the decree,* and of all personal property belonging to the

"said La Crosse & Milwaukee Railroad Company, inclu-
"ding such as have been procured by the Receiver and
"now on hand, and that he make report of the same on
"the eighth day of June next.

"And as in pursuance of the act incorporating the La
"Crosse & Milwaukee Railroad Company, a continuous
"road has been constructed and operated between La
"Crosse and Milwaukee, and the interest of the public
"requiring that the said road, as constructed and operated,
"shall continue to be so operated, it is ordered by the
"court, (reserving the right to rescind, change or modify
"this order at any time hereafter) that the said Milwaukee
"& St. Paul Railway Company and the Receiver who con-
"tinues to be the Receiver of the Eastern end or division
"of said La Crosse & Milwaukee Railroad between Mil-
"waukee and Portage City, jointly operate said road
"between La Crosse and Milwaukee without interruption,
"and that the said Milwaukee & St. Paul Railway Com-
"pany, and the said Receiver, jointly, employ all the
"agents and persons necessary for the proper operating
"of said road; that the revenues of said road be paid to
"the Receiver as heretofore, who shall keep all accounts
"and books for the inspection of the said company, and
"said company may keep duplicate books, and that all
"payments and disbursements for necessary expenses in
"operating said road shall be paid out of the joint fund,
"each division of said road to be entitled to its proportion
"of revenue and to be charged with its proportion of
"disbursements, and that the said Receiver pay coupons
"of bonds in prior mortgages as heretofore."—Record,
104, 105, 106.

This order gave the St. Paul Company possession of all it had purchased; although under the possession, that company was required to operate its road in connection with the Eastern Division still in the hands of the Receiver. The order to deliver possession is carefully drawn, and

confined to the Western Division and the forty box cars "*specially described in the decree.*"

On the 12th June, 1863, the court had determined to permit the St. Paul Company to operate the Eastern Division in connection with its own division, and to release the Receiver from all duty in that behalf. Two orders were therefore made on that day as follows:

WESTERN DIVISION CAUSE.

"On consideration of the said petition of the Milwaukee & St. Paul Railway Company, and of the arguments of counsel, it is ordered by the Court that there be delivered over to the said Milwaukee and St. Paul Railway Co. all and singular the railroad between the city of La Crosse and Portage City, its roadbed and track, with its depots, station houses, engine houses, and all other property belonging to said railroad between the said points; and the forty box cars mentioned and described in the decree.

"And also the share or proportion of the rolling stock and personal property purchased by the receiver, as mentioned in the decree.

"And also, *subject to other or previous liens or claims*, the possession of the rolling stock on hand when the Receiver took the same under the order of the Court. And it is further ordered by the Court, that the said Receiver be and hereby is discharged as such from the management and control of the said Western Division of said railroad under the appointment in this case, subject, however, to the final settlement of his accounts, *and subject to the orders* made or to be made in this case and in the other cases in which he was appointed or may hereafter be appointed."—Record, 104, 106.

EASTERN DIVISION CAUSE.

After reciting the petition of the St. Paul Co., &c., &c.

"It is thereupon ordered by the Court that the order appointing a Receiver in this case be modified in the manner following, *subject to any further or other order rescinding, altering or modifying this order now here made:* That the Receiver let the said Milwaukee & St. Paul Railway Co. into the possession of the Eastern Division of the La Crosse & Milwaukee Railroad from Portage City to Milwaukee, with the appurtenances and property and rolling stock thereto belonging. And that the said Milwaukee & St. Paul Railway Co., subject to further order or orders of the said Court, operate said eastern division of said railroad in connection with the said western division thereof, so that one continuous line of railroad between La Crosse and Milwaukee may be operated and conducted as directed in the original charter of the La Crosse and Milwaukee Railroad Co., without hindrance, interruption or diversion, the same as if the whole line of road continued to be in one company in pursuance of said charter and not otherwise.

"And it is further ordered by the Court that the said Milwaukee and St. Paul Railway Co., shall at all times allow and permit the Receiver or such other persons as may be at any time appointed for that purpose, to have daily access and examination of the records, books, papers, accounts, proceedings, receipts and revenues, and also of the transactions of the said Milwaukee and St. Paul Railway Co., and of its Board of Directors, in relation to the business and operation of the whole line of road, and that the said Railway Co. shall, out of the revenues of said

road, *keep the said eastern division and all the rolling stock in good order*, and defray all running and other necessary expenses, and at the end of every month deliver to the said Receiver, or such other person as may be appointed, a full and detailed account of all revenues arising on the whole road, and of all necessary disbursements out of the same, and pay over monthly to the Receiver the proportion of the said eastern division of the net revenues of the said railroad. And that the said Receiver make monthly returns as heretofore, of his accounts into Court, and disburse the moneys by him received from time to time in the payment of liens and debts of the said La Crosse and Milwaukee Railroad Co., according to their priorities and equities.

"And it is further ordered by the Court, that before the said Milwaukee and St. Paul Railway Co. be permitted to have possession under this order, the said company, by its constituted officers, shall enter into bond to the United States, for the use and benefit of all interested, with sureties to be approved by the Court, in the penalty of one hundred thousand dollars, conditioned that the said company will faithfully comply with this order of Court this day made, and any subsequent orders relating to the operation and management of the said railroad between La Crosse and Milwaukee and will keep said road and the rolling stock and property in good order, and shall manage and conduct the same to the best advantage of the public and the La Crosse and Milwaukee Railroad Company, and shall make monthly returns and pay over the net revenues of said road, according to this order."—Record, 101.

The order in the Western Division cause deserves particular attention. It orders the Receiver:

(1.) To deliver to the St. Paul Company full possession of the Western Division; "*and the forty box cars mentioned and described in the decree.*"

(2.) To deliver also full possession of the "share or proportion of the rolling stock and personal property purchased by the Receiver, *as mentioned in the decree;* thus

terminating the joint occupancy with the Receiver with which that possession had been burthened by the order of May 7.

So far, the order is absolute; and shows by the repetition of the words at the end of each clause, "*mentioned and described in the decree*," that the court was delivering possession of what the St. Paul Company had *acquired title to* by its purchase under the decree.

Then the order proceeds to direct the Receiver to deliver also, subject however to all "OTHER or *previous liens* or CLAIMS, the whole rolling stock on hand when he was appointed, that is, the remainder of the rolling stock except the forty box cars, which belonged to the Eastern Division, and of course *was not mentioned and described in the Land Grant Decree*, therefore this clause is not followed, as the others were, by these words, "*mentioned and described in the decree.*"

Considering the careful and guarded language of this order, it is impossible not to see that the court was drawing the distinction, in what it ordered to be delivered to the St. Paul Company, between that which belonged to them by their purchase under the decree; that is, the Western Division the forty box cars and the proportion of rolling stock purchased by the Receiver; and that which was delivered to them temporarily, but *not by virtue* of their purchase *under the decree.*

The court in substance said—"take absolutely all that was purchased by you under the decree—the Western Division forty box cars, and the proportion of rolling stock purchased by the Receiver; this you have purchased. The remainder of the said rolling stock has been ascertained to belong to the Eastern Division, and it must there remain; but we give it, *with the Eastern Division*, into your possession temporarily; that the whole may be operated together."

2. Turn now to the order in the Eastern Division cause. The court had decided that all the rolling stock,

except forty box cars was included in the Eastern Division first mortgage: that is, that it belonged to the railroad *between the limits of Milwaukee and Portage;* because such is the description in that mortgage. The court had determined for reasons of public policy, etc., set forth in the preamble to this order, to give to the St. Paul Company the posession of the Eastern Division mortgage premises, temporarily. This order gives to the St. Paul Company the posession of the Eastern Division "*and rolling stock thereto belonging,*" but subject nevertheless "*to any further or other order rescinding, altering or modifying this order now here made.*"

How absurd to pretend that the court in this order regarded the rolling stock pertaining to the Eastern Division, as having been purchased by the St. Paul Company. Did a court ever yet put a purchaser into possession after final decree and confirmation of sale, "*subject to any further order recinding*" *the same?* This right reserved to the court to *rescind* the order giving the St. Paul Company the Eastern Division "and the rolling stock belonging thereto," is conclusive that the court was granting to that Company a *favor* and not a *right;* a temporary possession, not a title.

It is to be kept in mind that there is no rolling stock covered by and included in a mortgage, except it is a part of the premises described in the mortgage. The Eastern Division first mortgage granted the rolling stock pertaining thereto "between the limits" of Milwaukee and Portage. Therefore, when the court decided that all the rolling stock that was on the road when the Receiver took possession, was covered by and included in that mortgage, it thereby decided that it was rolling stock pertaining to the Eastern Division "between the limits aforesaid," because that mortgage expressly declared that it covered no other rolling stock or property; and the court also decided that the said rolling stock pertaining

to said Eastern Division was to be regarded as a *fixture* upon that division.

See the premises of that mortgage, Record, 36.

Therefore, the order that gave the St Paul Company temporary possession of the Eastern Division *"and the rolling stock belonging thereto"* gave all the rolling stock on the road when the Receiver was appointed, except the forty box cars, and this possession was expressly given *subject to be recinded by the court.*

In an opinion delivered by His Honor, the District Judge, at the April term, 1864, and published May 12, 1864, nearly a year after these orders, the judge says:

"The first duty of the court is to secure the interests of the public, under the grant of the Charter of the La Crosse Company. The second duty is to protect the rights of the lien creditors and the parties litigant. The Receiver was appointed for these two purposes.

"For this purpose the orders of the 12th of June, 1863, in this [Eastern Division] case and in the Howard case modifying the original orders, appointing the Receiver, were made. The Milwaukee & St. Paul Company were allowed by those last orders to operate temporarily the Eastern Division of the road in connection with the Western Division, of which they were owners for the sake of economy in operating the road *to secure the use of all the rolling stock on the whole line, and to restrain the St. Paul Company from diverting trade and travel from the Eastern Division.* It was known that the St. Paul Company were about to connect their division, from Portage City with the Watertown Road and thence to Milwaukee, *which might affect the Eastern Division.*

"The order allowing that company to operate the Eastern Division, subject to the control of the court and the supervision of the Receiver, and under heavy bonds with adequate security, *prohibited them from putting a car on the extension from Portage or on any other road east of that point.*

I considered it a proper duty for the public and the parties *to secure the use of a continuous route according to the charter without interruption or deviation of trade or travel* between the termini of the road."—Record.

Here is the opinion of the judge who made these orders as to what was his intention in making them.

It is to be remembered that the order of the court upon the Master's Report, declared that all the rolling stock, on the road when the Receiver was appointed, and the proportion of rolling stock purchased by the Receiver and not belonging to the Land Grant Mortgage, belonged to the Eastern Division first mortgage; and the languge which gave the Eastern Division mortgage that proportion of stock is identical with that which gave the Eastern Division mortgage all of the original stock, except the forty box cars. If the St. Paul Co. may take one class of stock, it must take the other, by irresistible reasoning, and leave the Eastern Division without a car. Yet the judge in this opinion says his orders of June 12, 1863, *restrain and prohibit* the St. Paul Company from *taking a car* from the Eastern Division.

It is submitted that the mortgages, the proceedings of record in both these causes, and the published opinion of the judge, all concur in establishing the following propositions:

1. That of the seven mortgages given by the debtor company, the Barnes mortgage alone included and covered rolling stock belonging to both divisons.

2. That to ascertain how much rolling stock was included in the Land Grant Mortgage, as pertaining to the Western Division, the Court referred it to masters, who reported that forty box cars only were "covered by and included in" that mortgage; and that all the other rolling stock was covered by and included in the Eastern Division mortgages, or in other words, pertained to the road "*between*

the limits," Milwaukee and Portage, and was a fixture thereon.

3. That the Trustees in the Land Grant Mortgage excepted to the Master's report, claiming that that mortgage covered and included all the rolling stock; that the Court overruled the exception, except as to the forty box cars; and confirmed the Master's report so far as to hold that all the rolling stock, except the forty box cars, was covered by and included in the Eastern Division first mortgage, which described, as we have shown, only the rolling stock "pertaining to the road between the limits aforesaid"—Milwaukee and Portage.

4. That the decree in the Land Grant cause directed the sale of only the forty box cars; and recited and determined that all the other rolling stock was covered by the Eastern Division mortgages, and not by the Land Grant mortgage.

5. That although the marshal presumed to sell all the rolling stock, and that sale was confirmed; yet, that the court in all its subsequent orders recognized the right and title of the St. Paul Co. to the forty box cars only; and only gave the other rolling stock to be held temporarily, not by right or title, but as the Receiver of the court, under bonds to keep the same in repair, and obey any order the court might make rescinding the order which gave this temporary possession.—Record, 103, form of bond given.

Or to sum up the result of all in a single proposition, the St. Paul Company has acquired a title to forty box cars and no more of the rolling stock in question.

II.

IS THE ROLLING STOCK A FIXTURE?

Rolling stock put and used upon a railroad becomes an accessory, if not a fixture, and passes with a conveyance of the road and franchises *even without mention* or specific description. These mortgages were therefore not void for

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uncertainty, as regards the rolling stock. And the court in the Land Grant cause having ascertained how much of this rolling stock was appurtenant to the divisions respectively; the rolling stock, so far as regards the parties to that cause, and the purchaser under that decree, must be held to belong, forty box cars to the Western Division as an accessory or fixture, and all the remaining rolling stock, to the Eastern Division or a fixture thereon.

This proposition is so conclusive of the right to this rolling stock, that I ask a careful consideration of it.

The term *fixture*, was early seized upon by legal writers to supply a deficiency in their technical terminology; but was not entirely reclaimed from its popular use, and fixed in that strictness and uniformity of meaning requisite to scientific certainty; and it has, as used by legal writers, continually fluctuated between a technical and its popular use. We have, therefore, many kinds of fixtures; and many exceptions and qualifications to each kind. A fixture is one thing between landlord and tenant; a different thing between vendor and vendee; is one thing in the economy of trade; another for the purposes of agriculture. Originally the term denoted those movable things which had become immovable by connection with the freehold. But presently it became to mean those things, that although attached to the freehold, could under certain circumstances be removed. In its popular use it meant something affixed or fastened to the freehold; and in the early cases, and many of the later ones, we find the popular definition of the term sweeping everything before it; and an article was held a fixture or not, from the presence or absence of a screw fastening it to the floor.

By the great majority of cases, ancient and modern, there is no doubt that a fastening was essential to constitute the thing in question a part of the freehold; and nothing kept in place by mere gravitation was held to be a fixture. It is equally true that from the first, we have the doctrine of constructive annexation equally well es-

tablished. *In Liford's case*, 11 *Co.* 50, it is said to have been decided in the fourteenth year of Henry VIII., that a mill stone, removed from a mill to be picked, was nevertheless constructively a part of the freehold, and passed by deed conveying the mill. In England, Title Deeds have been held fixtures; and deer in a park, and fish in a pond, have been held to pass with the estate.

The right to remove articles as fixtures, has been carried farther in favor of tenants and to encourage trade than any other cases; yet this right has been somewhat limited; and it has been held that where an engine, in no way attached to the freehold, could not be removed without injury to the building in which it was set up, that the tenant could not remove it. And there are cases in England of more recent date, still farther tending to put this subject upon a reasonable, and not technical or philological ground; and to hold that a thing is to be regarded as real or personal property according to its relation to, and connection in use with, the freehold; rather than from the manner in which that connection may be accomplished. And it has been expressly decided that actual *fastening* is not necessary to make a thing part of the estate.

In the United States we have three different rules established by different States.

1. To constitute a fixture, so as to pass with the real estate, it must be so *fastened* to the estate that its removal would seriously injure the freehold, beyond the loss of the thing removed.

2. If the chattel is essential to the use of the real estate, and actually, though slightly attached, it will pass with the freehold.

3. If the thing *be essential to the use of the real estate*, and has uniformly been used with it, then it passes, *though not fastened to it.* As an original proposition, the third rule seems most satisfactory and philosphical. Take for instance a manufacturing establishment. The building is constructed to receive the various machines necessary

for carding wool, spinning yarn, weaving and dressing cloth, and this business is carried on in the building. One machine is so light, or its motion so violent, that it must be steadied by some fastening to the floor; the next is heavy, enough to keep in place by its own weight. Now there is no reason in saying that one machine will, and the other will not pass with the freehold. Both are essential to the same business, one is useless without the other, and both are in the mind of the purchaser when he buys the establishment. It seems absurd to say that to be sure of getting all the machinery, he must nail it down to the floor, when perhaps fifty men could not start it a hair, The purpose for which the thing was constructed, and the manner in which it was enjoyed in connection with the freehold, should determine whether it is real or personal estate.

Following this view, in *Farrar v. Stackpole*, 6 *Greenl.* 157, it was held that where machinery was essential to the purposes for which the building in which it was used was erected, that this fact alone constituted it real estate, whether nailed down, or held down by the laws of gravitation.

Lawton v. Salmon, 1 H. B. 259.
Farris v. Walker, 1 Bailey, 541, (S. C.)
Voorhies v. Freeman, 2 W. & S. 46.
Goodrich v. Jones, 2 Hill, 142.

Pyle v. Pennock, 2 *W. & S.*, 390, are to the same effect; although a far greater number of cases could be cited to the contrary, both from England and American reports.

In *Walker v. Sherman*, 20 *Wend.* 136, actual *fastening* was held essential; but in the more recent case, *Snedeker et al.* vs. *Warring*, 2 *Ker.* 170, this distinction is overruled, and the law of fixtures put upon the sensible ground according to the doctrine in the above cases. In the latter case, a statue and sun-dial were held part of

the real estate. The court say, "it the statue had been "actually affixed to the base, by cement or clamps, or in "any other manner, it would be conceded to be a fixture "and to belong to the realty. But as it was, it could "have been removed without fracture to the base on "which it rested. *But is that circumstance* controlling? "A building of wood, weighing even less than this "statue, but resting on a substantial foundation of "masonry, would have belonged to the realty. A thing "may be as firmly affixed to the land by gravitation as "by clamps, or cement. Its character may depend much "upon the object of its erection. *Its destination, the inten-* "*tion of the person making the erection*, often exercises a "controlling influence; *and its connection with the land*, "is looked at principally for the purpose of ascertaining "whether that *intent* was that the thing in question "should retain its original chattel character, or whether "it was designed to make it a permanent accession to the "lands." We come now to give this law of fixtures an application to a new subject-matter.

Here is a corporation created by law to build, equip, and operate a railroad, and for no other purpose. It mortgages its road-bed, between certain limits, all its depots, and station buildings, its right of way, *and all appurtenances*, between those limits; *and all the franchises, privileges and rights* of the company of, in and to, or concerning the same. The road is useless without the rolling stock. Here is a case then falling fully within the principle of *Farrar v. Stackpole; Voorhies v. Freeman; and Pyle v. Pennock;* the real estate worthless without the rolling stock, which has been used *only* upon the road; and the rolling stock, so essential to the use of the road, utterly worthless for any other or *different* use. We have already seen the *senseless* fiction of *fastening*, done away with; and we have but to apply the principles of the cases cited, and we shall come to the result that the rolling stock is in the nature of a *fixture;* and as such must be conveyed

by the mortgage conveying the estate. True it has not *exactly* the same connection with the realty that the statue had in *Snedeker v. Warring;* it is not held or kept in *one* place by fastenings, or by its weight. But this circumstance is of no consequence if the principle deducible from the cases above cited is to govern. If a billiard table were fastened to the floor so as to be conceded a fixture, would not the balls and cues pass also? A bucket in a well may be detached, and it is movable, running from top to bottom of the well, yet it is a fixture by common consent. A shuttle in a loom is thrown from place to place by the motive power of the machinery, yet it is an essential part of the machine. It is not inconceivable that rails and cars might be so constructed as that the car should be held upon the rail by certain material contrivances, and yet be propelled from one station to another; from one end of the road to another, by steam power. In such a case none would doubt that the cars were a fixture. Can it be said that the manner of accommodating and adjusting the cars to the rails can make any difference?

"The railroad like a complicated machine consists of a "great number of parts, a combined action of which is "essential to produce revenue. And as well might a cred- "itor claim the right to levy on and abstract some essen- "tial part from Woodworth's planing machine, or any "other combination of machinery, as to take from a rail- "road its locomotive and passenger cars. Such an ob- "struction would cause the operations to cease in both "cases." *McLean J. in Coe v. Pennock et als.* Again, to follow the principle of *Snedeker v. Warring*, it may well be said that the *destination of the rolling stock, the intention of the Company*, have a controlling influence in determining whether it is real or personal property: "and its connection with the land is looked at principally for the purpose of ascertaining whether or not it was the intention of the company that the rolling stock should preserve its

chattel character, or become a permanent accession to the land."

These considerations are as conclusive in regard to the furniture of the road, as they were in regard to the statue. *And even more so.* The statue might have been sold by the sculptor for the adorning of *any residence*; though, in fact, it was made for the particular use. Here, the rolling stock was not only designed by the Company to be used *only* on the railroad, but this Company had no legal right to buy or own the stock for any other purpose. The right to buy and own rolling stock is a franchise, and can only be exercised as an accessory to the operation of the railroad. Any buying or selling of cars, engines, &c., by the Company for the mere purpose of speculation, would be unauthorized and illegal. Here, then, is a consideration showing conclusively that the Company intended the rolling stock to be used only for the road, or in other words, to become *a permanent accession* to the real estate of the Company. The intention of the owner; the use for which the property was designed; the connection between the road and the cars, and the essential relation between them, for the purposes of revenue, all combine to declare the rolling stock real estate.

In Pierce vs. Emery, 32 N. H., 484, the Portsmouth & Concord Railroad Company had mortgaged all their property, real and personal, *and all their franchises.* The court held that the rolling stock acquired subsequent to the execution of the mortgage belonged to the mortgagee. The court say, "The object of the act being to give the bondholders a substantial and available security for their money; and a preference over other creditors not previously secured, can only be answered by so construing the law" (authorizing the mortgage,) "as to give the bondholders security upon the road itself, *as the general subject-matter of the mortgage, and upon the changing and shifting property of the road as part and parcel, by accession, of the thing mortgaged.*"

In Phillips v. Winslow, in Kentucky, it was held that in equity, the rolling stock acquired subsequent to the execution of the mortgage, passed as an accession, or fixture.

See also Pennock v. Coe, 23 How. 117.

In Redfield on railways, p. 576, note, it is said that rolling stock is an *accessory* though not a *fixture*. In the strict technical sense of the word, as used in the old cases, rolling stock is not a *fixture;* but we submit that within the reason and philosophy of the modern cases it is so; or that, if it must be called *not a fixture*, in deference to the old cases, it is yet an *accessory*, and as much a part of the road as a fixture would be. When the Court, therefore, in the Land Grant cause, determined how much of this rolling stock was covered by the Land Grant Mortgage, and that the remainder of it was covered by the Eastern Division Mortgage, it did thereby settle the fact, that all the rolling stock which was included in the Eastern Division Mortgage—that is, all except the forty box cars—was a part of that division; and of course the Land Grant Mortgage, (which does not pretend to touch the Eastern Division or whatever belongs to it, as an accessory or fixture,) does not include it.

Thus it is seen that the legal effect of the order of the Court upon the master's report, and the decree in the Land Grant cause, is to exclude all claim under that mortgage to any but the forty box cars, *even if it had been intended otherwise;* which we have shown was not the case.

2. It would be improper here to enquire how the masters ascertained the fact; or, in other words, whether the testimony before them was sufficient to sustain their finding. The exceptions to the report were overruled, the decree was based upon them, and no matter how erroneous they may have been, or how insufficient the testimony may have been to sustain them, or whether the testimony directly contradicts the findings of the report, and the decree, because the trustees *executed that decree and did not appeal*

from it. The rights which the St. Paul Co. has, are precisely those which the decree, qualified by the previous order, gave, *whether that decree was right or wrong.*

III.

Our Rev. Stat., page 510, in force when the Land Grant Mortgage was executed, provides:

Section 33.— * * * * and in case of any sale of any railroad or railroads, or any part thereof, constructed or in process of construction by any railroad company, on or by virtue of any trust deed, or on any foreclosure of any mortgage, thereupon the party or parties acquiring title under any such sale, and their associates, successors, assigns, shall have and acquire thereby, and shall exercise and enjoy thereafter, all and the same rights, privileges, grants, franchises, immunities, and advantages, in and by said mortgage or trust deed enumerated and conveyed, which belonged to and were enjoyed by the company making such deed or mortgage, or contracting such debt, *so far* as the same relate and appertain to that portion of said road, or the line thereof, mentioned and described in and conveyed by said mortgage or trust deed, *and no further*, as fully and absolutely in all respects as the corporators, shareholders, officers, and agents of such company might or could have done therefor, had not such sale or purchase taken place; such purchaser or purchasers, their associates, successors or assignors, [*assignees,*] may proceed to organize anew, and elect directors, distribute and dispose of stock, take the same or another name; and may conduct their business generally under and in the manner provided in the charter of such railroad company, with such variations in manner and form of organization as their altered circumstances and better convenience may seem to require: *provided, however*, that no greater or enlarged powers shall be exercised by the new organization, than are conferred by the charter of such company.

The Land Grant Mortgage conveyed the Western Division, "and also all and singular the rights, liberties, privileges and franchises of said railroad company, of every kind and description, *relating to said road*"—that is, relating to said *Western Division*. The purchaser acquires just what was mortgaged, the Western Division, and the right to use, operate and enjoy in the same way that it could have been used, operated and enjoyed by the company, had the mortgage not been given. The company was incorporated to build, and did build and put in operation, a continuous line of railway, connecting the Mississippi River with the Sea of Michigan; and every man who subscribed and paid for stock, did so upon the assurance of the Legislature that the road was to be one, and to be operated as one great link in the communication between the Eastern and Western States. And every holder of a bond secured by a mortgage on any part of this road, holds his security on a part of a *through route*, and not on fifty miles, as a distinct road. I take it to be clear that, had the La Crosse & Milwaukee Railroad Company, after completing its road, proposed to divert the Western from the Eastern Division, and make it auxiliary to some other road, thereby rendering the Eastern Division far less valuable, and violating the public policy of the State by dividing into two roads what the Legislature had provided should be one, that any stockholder or mortgage bondholder of the company could have filed his bill in equity to enjoin the company against thus departing from the fundamental objects of its charter. Such suits have been frequently sustained. (Bagshaw vs. Eastern M. E. R. R., 7 Hare, 114; Kean vs. Johnson, 1 Stock, Ch. 401; Redfield on Railways, 495 and notes; The Great North. R. R. vs. East. R. R. Co., 41 Eng., Ch. 304.)

If the company could not make such separation of its road, it could not convey to one or more persons, or classes of persons, the right to do so. The rights, privileges and franchises of the company "*relating to said road*,"

from Portage to La Crosse, authorized the company to operate it *in connection with the Eastern Division*, as a part of one continuous road, *and in no other way*. This right it has mortgaged, and the purchaser at the sale acquired it; but does not acquire any other or different rights concerning it, or authority or dominion over it than the railroad company had. Therefore, the scheme of these purchasers to take possession of the Western Division, separating its interests entirely from the Eastern Division, to unite its destinies with what is called the Milwaukee and Western Railroad Company, can be arrested by the Milwaukee and Minnesota Railroad Company, or any other person interested, by this bill.

Upon this ground alone the injunction prayed should be granted. The bill shows that the Milwaukee and St. Paul Railway Company is diverting the use of this rolling stock to another road; and thus using the Western Division in opposition to the interests of the Eastern Division, even if it were conceded that the Land Grant Mortgage did cover all the rolling stock that belonged to the Eastern Division.

IV.

This is a bill in the nature of a supplemental bill, and the Circuit Court of the United States had jurisdiction of it, although the complainant and the Milwaukee & St. Paul Railway Co., one of the defendants, are both corporations created by the laws of the same State.

"The most general division of bills is into those which "are original, and those which are not original. Original "bills are those which relate to some matter, not before "litigated in the court, by the same persons standing in "the same interests. Bills not original, are those which "relate to some matter already litigated in the court by "the same persons, and which are either an addition to, "or a continuance of an original bill or both.—Story Eq. "Pl., Sec. 16.

"Bills not original are either (1) an addition to, or a "continuance of an original bill; or, (2) they are for the "purpose of cross litigation, or of controverting or sus- "pending, or reversing some decree or order of the court, "or carrying it into execution."—Story Eq. Pl., Sec. 20.

"An imperfection in the frame of the bill may generally "be remedied by an amendment; but the imperfection "may remain undiscovered whilst the proceedings are in "a state that an amendment can be permitted according "to the practice of the court. *This is particularly the case "where, after the court has decided upon the suit as framed, it "appears necessary to bring some other matter before the court "to obtain the full effect of the decision.*"—Hughes Eq. Draftsman, 400.

1. In this cause, as to the rolling stock purchased by the receiver, and which is disposed of by the decree; or rather, as to which the decree merely declares the principle that shall govern its division between the two portions of the road, nothing was put in issue by the original frame of the bill, upon which it could be determined how much belonged to the Eastern, and how much to the Western Divisions respectively; and after publication this matter could only be determined by supplemental bill.

Goodwin v. Goodwin, 3 Atk., 370.
Dormer v. Fortesque, 3 Atk., 132, 133.
Jones v. Jones, 3 Atk., 109.
Edgar vs. Clevenger, 2 Green Ch., 258.
Allen vs. Taylor, 2 Green Ch., 435.
Whitbeck v. Edgar, 4 Sandf. Ch., 427, 433.
Foster v. Deacon, 6 Madd., 59.

It is settled by the decree that the purchaser shall acquire such a proportion of the rolling stock, as the net earnings of the mortgaged premises—the Western Division—bear to those of the Eastern Division; but what that proportion is, whether one-third, one-half, or two-thirds, the decree does not profess to determine, nor did the

record disclose the facts upon which the court could determine it, at the date of the decree. This can only be done by a bill like the present, in the nature of a supplemental bill between the owner of the equity of redemption and the purchaser.

Story Eq. Pl., Sec. 345.
Whitbeck v. Edgar, 4 Sandf. Ch., 427.

The decree settled the rights of the purchaser and of the owner of the equity of redemption, in one sense, by settling the principle upon which the rolling stock was to be divided.

It is true that the other mortgages of the debtor company are not bound by this decree, not being parties to the record. But the Milwaukee & Minnesota Railroad Company was the owner of the equity of redemption of the whole road, and as against the purchaser under the Land Grant decree, of course remains, since the sale, the owner of all the rolling stock, except that which the purchaser acquired under the decree. The purchaser of the premises, the Milwaukee & St. Paul Railway Company by its bid, became a *quasi* party to the suit, Blossom vs. Railroad Co., 1 Wallace, 556, and the Milwaukee and Minnesota Railroad Company was a party; and the decree is binding and conclusive between these parties; and settles the principle upon which the rolling stock must be divided between them; and each of these parties, as against the other, has an interest in the decree, and a right under it, to secure the benefit of which either of them may invoke the aid of the court. The purchaser, the Milwaukee & ~~Minnesota~~ St Paul Railroad Company, may claim under this decree, forty box cars, and a proportion of the rolling stock purchased by the receiver, and the Milwaukee & Minnesota R. R. Co. may claim under this decree, and as against the purchaser, all the other rolling stock. And the decree just as effectually settles this right of the latter company, as it does the right of the purchaser. But they must de-

termine by arrangement between themselves, or by subsequent litigation, the matter of fact, that is, what ratio the net earnings of the Western Division bear to those of the Eastern Division, and to this fact when ascertained, the court will apply the principle of the decree and thus determine the respective rights of these parties to the rolling stock purchased by the receiver.

See Story Eq. Pl., Sec. 335, 338, 345.
Dormer v. Fortesque, 3 Atk., 132, 133.

This is one of the objects sought, by the Milwaukee & Minnesota Railroad Company, to be accomplished by this bill; and clearly, as to this matter, this bill *relates to the original suit, and merely supplies a defect which existed in it by necessity;* and therefore comes precisely within the definition given by Story, Mitford, and all other writers, of a bill in the nature of a supplemental bill, *which all define as a bill not original.*

The cases clearly establish the right to maintain a supplemental bill, to have the original decree carried out and applied to its subject-matter.

Binks vs. Binks, 2 Bligh, 593.
Woodward v. Woodward, 1 Dickens, 33.
Story Eq. Pl., Sec. 429.
Lord Cartevelt v. Paschal, 3 Peere Williams, 197.
Linton v. Petits, 4 Blkfd., 396.
Lawrence vs. Berney, 2 Rep. in Ch., 128.
Hodson v. Ball, 1 Philips, 179.

The cases as clearly establish the right of a defendant, as well as a complainant, to maintain such bill to secure a right secured by a former decree.

Story Eq. Pl., 337, *a.*
Standish v. Radley, 2 Atk., 177.
Baker v. Whiting, 1 Story Rep., 218.
Barrington v. O'Brien, 2 Ball & Beatty, 140.
Gifford v. Hort, 1 Sch. & Lef., 386, 394, 410.
Foster v. Deacon, 6 Madd., 44, 59.

Whitbeck v. Edgar, 4 Sandf. Ch., 432.
Heathcote v. Heathcote, 4 Hare, 161; 30 Eng. Ch. R.
Whitbeck v. Hughes, 1 Dickens, 283.
Barrington v. O'Brien, 1 Ball & Beatty, 173.
Williams v. Cook, 10 Ves., 406.
Welford Eq. Pl., 113.
Oldham v. Oldham, Cooper Temp. Brougham, 27.

The principle of the former decree must be applied in the suit by supplemental bill, whether right or wrong.

Jenkins v. Cross, 38 Eng. Ch., 75.

These cases leave no doubt of the right of the complainant to maintain this bill as to the rolling stock purchased by the Receiver, as a bill in the nature of a supplemental bill. If the bill can be maintained for any purpose, the demurrer, which is general, must be overruled.

Story Eq. Pl., 443 and notes.

Being a supplementary bill, it is no objection to the jurisdiction that the parties to it are citizens of the same State.

Hatch vs. Dorr, 4 McLean, 112.
Morgan vs. Morgan, 2 Wheat., 290.
Logan vs. Patrick, 5 Cranch, 288.
Dunlap vs. Stetson, 4 Mason, 360.
Molan vs. Terrance, 9 Wheat., 537.
Clark vs. Matthewson, 12 Pet., 164.

V.

But there is still a broader ground upon which this bill must be sustained, not only as to the rolling stock purchased by the Receiver, *but as to all the rolling stock.*

In our complex system of Federal and State jurisdictions, that court, whether State or Federal, which first acquires jurisdiction of any subject of litigation, must re-

tain it to do full and complete justice between the parties; and not only between the parties, but between them and any third person not a party to the record, as to the subject-matter of litigation of which it has acquired jurisdiction.

If in the exercise of its jurisdiction, a Federal court, by its receiver or marshal, comes to have custody of any property, real or personal, a third person, not a party to the proceedings, but claiming any right to or interest in such property, must come into such court and there litigate his right. No State court can entertain any suit with regard to property so held; and for that reason the Federal court will sustain a suit in equity to protect the rights of such third person, without regard to citizenship of parties, because such suit is not original but ancillary and supplementary merely to the original suit out of which the question arises.

Freeman v. How, 24 How., 460.

This rolling stock, belonging to the complainant in this bill, is in the custody of a receiver of the Federal court, or should be; a State court cannot entertain any suit in regard to it without coming in direct conflict with the jurisdiction of the Federal court. There is no such thing as a partial jurisdiction over the subject-matter of a litigation. It is full and complete, or does not exist at all. If a State court could entertain this bill, then it could appoint a receiver to take possession of the property pending the litigation; yet the property is already held by a receiver of the Federal court.

The complainant is therefore without any remedy except in this court.

Again, this bill states, and the demurrer admits, that this property was taken into the custody of the Federal court by its receiver; that the Receiver and the defendant are in corrupt collusion to injure and defraud the complain-

ant; and that the decree of the Federal court and its possession by receiver are being perverted and abused to the complainant's injury. Upon this ground alone this bill is properly brought in the Federal court.

Freeman v. How, 24 How., 460.

MATT. H. CARPENTER,
Counsel for Appellant.

Judge Field 698

Supreme Court of the United States.

No. 279.

THE MILWAUKEE AND MINNESOTA RAILROAD COMPANY,
Appellants,

vs.

THE MILWAUKEE AND ST. PAUL RAILWAY COMPANY, IMPLEADED WITH JAMES T. SOUTTER AND OTHERS, Appellee.

BRIEF OF JOHN W. CAREY, FOR APPELLEES.

McGill & Witthaow, Printers & Stereotypers, Washington, D.C.

Simple Tense

697

Supreme Court of the United States.

No. 279.

THE MILWAUKEE AND MINNESOTA RAILROAD COMPANY, Appellants,

vs.

THE MILWAUKEE AND ST. PAUL RAILWAY COMPANY, IMPLEADED WITH JAMES T. SOUTTER AND OTHERS, Appellee.

On the 5th day of December, 1859, Greene C. Bronson, James T. Soutter, and Shepherd Knapp filed their bill in the district court of the United States for the district of Wisconsin, to foreclose a mortgage given to them as trustees, on the western division of the La Crosse road, commonly called the Land Grant Mortgage. Such proceedings were had in that suit, that on the 13th day of January, 1862, a final decree of foreclosure and sale of the mortgaged premises was entered, in pursuance of which the marshal of said district sold said mortgaged premises on the 25th day of April, 1863, to William W. Pratt and William H. White, which sale was afterwards, and on the 5th day of May, 1863, confirmed as made; and on the said 5th day of May said Pratt and White, as such purchasers, under and in pursuance of the statutes of Wisconsin, organized the said Milwaukee and St. Paul Railway Company, and conveyed to it the mortgaged premises so purchased by them. And afterwards, and on the 12th day of June, 1863, the receiver in said foreclosure suit, in pursuance of the order of said district court made in said cause, delivered to said Milwaukee and St. Paul Railway Company the property so purchased. The said Milwaukee and Minnesota Railroad Company was, among others, named as a defendant in said foreclosure suit. Afterwards, and on the 10th day of August, 1864, the said Milwaukee and Minnesota Railroad Company, as one of the

defendants in said foreclosure suit, filed the bill of complaint in this cause against James T. Soutter and Shepherd Knapp, survivors of Greene C. Bronson, and also against William W. Pratt, William H. White, and the Milwaukee and St. Paul Railway Company, as defendants, as a supplemental bill to said foreclosure suit. The bill is filed without leave of the court, and service of subpœna made upon Pratt and White and the Milwaukee and St. Paul Railway Company, but not upon Soutter and Knapp, and they have not appeared in the case.

The bill of complaint sets forth that the La Crosse and Milwaukee Railroad Company was a corporation in Wisconsin, and that on the 21st day of June, 1858, it made a mortgage upon its road and property to William Barnes, which was foreclosed by a sale under the power therein contained by said Barnes, and purchased by him; and on the 23d day of May, 1859, he formed the said Milwaukee and Minnesota Company, under the laws of the State of Wisconsin, and that it thereby succeeded to all the rights of the La Crosse and Milwaukee Railroad Company, and immediately thereafter entered into the possession of said property and franchises of said La Crosse and Milwaukee Railroad Company, so far as the same were in possession of said La Crosse Company at the time of said sale. (See pages 1 to 5 of case.)

The bill sets forth that the La Crosse Company gave a mortgage to Palmer on the east division of said road. The said Land Grant Mortgage on the west division, and a mortgage to Bronson and Soutter on the east division, all of which were liens prior to said Barnes' mortgage. That bills of foreclosure were filed in the Land Grant and Bronson and Soutter mortgages, and copies of said mortgages and said foreclosure bills and part of the foreclosure proceedings are attached; and the bill claims that of the rolling stock on said road but forty box cars were covered by the Land Grant Mortgage, and a certain proportion of the rolling stock purchased by the receiver, which amount was not ascertained and fixed; and that said Milwaukee and St. Paul Railway Company acquired of said rolling stock, by its said purchase, only said forty box cars and such proportion of the rolling stock purchased by the receiver as the net earnings of the western division of said road bore to the eastern division; but that said Milwaukee and St. Paul Railway Company wrongfully pretend that they have purchased and are the owners of all the rolling stock which was on the road when the receiver took possession thereof, and that they have

wrongfully, fraudulently, and corruptly obtained possession of all of said rolling stock, and are using and enjoying the same, and that they ought to pay rent and account for the same. That they are threatening to disconnect the western division from the eastern, and connect it with the Watertown road, and thus make a through line from Milwaukee to La Crosse in competition with said east division, and to use said rolling stock on said competing line; and then prays that the title of said rolling stock and the right to the possession thereof may be established in the complainant as against said Milwaukee and St. Paul Company. That an account of the net savings of the eastern and western divisions may be ascertained, and the rolling stock purchased by the receiver divided upon that basis, and that the court may ascertain how much the Milwaukee and St. Paul Railway Company ought to pay for the use of said stock, and direct it paid or a judgment, and that it may be enjoined from setting up or claiming any rights in the eastern division of said road, and also prays for temporary injunction.

To this complaint the defendant, Milwaukee and St. Paul Railway Company, filed a demurrer, and assigned the following grounds of demurrer:

1st. That the court had not jurisdiction, on account of the citizenship of the parties.

2d. That this defendant was not a party to the original suit, and that no new or supplemental matter has arisen.

3d. That the decree rendered in said original suit had been completely executed before the filing of this bill.

4th. Want of equity in the bill.

The court below sustained the demurrer, and dismissed the complainant's bill; and from that decree this appeal is prosecuted.

I.

The decree should be affirmed, for the reason that the court below had no jurisdiction of the parties. The Minnesota and St. Paul Companies are both corporations of the State of Wisconsin. Pratt and White are citizens of the same State, and the citizenship of Soutter and Knapp is not stated. The parties, complainants and defendants, therefore, being citizens or corporations of the same State, the court below had no jurisdiction of the parties, as an original suit. Taking the case as made, Pratt and White and Sout-

ter and Knapp have no interest in the matter in controversy. They are neither necessary or proper parties to the action. No relief whatever is asked against either of them. They should not therefore have been made parties. The only parties named who have any interest are the two railroad companies. When persons who have no interest in the matter in dispute, or mere nominal parties, are joined with real parties in interest, their citizenship has no effect in determining the jurisdiction of the court; but it is determined wholly by the citizenship of the real parties in interest in the suit.

Wood et al. vs Davis, 18 Howard, 467.

As an original bill, therefore, the court below was without jurisdiction. The complainant insists that this is not an original bill; and the question arises, Does it belong to the class of original bills or those not original? It does not seek to alter or reverse the original decree; to add to or vary it; but states an entirely new cause of action. It sets up that the Milwaukee and St. Paul Railway Company has been guilty of trespass or conversion of certain personal property which the complainant claims, and that it sets up some claim or right to that property and to the eastern division of the La Crosse railroad, which the complainant insists is unfounded. It therefore asks the aid of the court, *first*, to declare, settle, and quiet its title to said property; *second*, a settlement and compensation by way of damages; and, *lastly*, that the wrong-doer shall be restrained in future. The complainant does not allege that it is in possession of any part of this property, or ever has been; hence a bill to quiet its title could hardly be sustained. The statement on the 4th page of the record, that the complainant took all the possession the La Crosse had, is not an allegation of possession, although intended to create that impression, as the possession of the La Crosse Company ceased years before—even before the Barnes mortgage had an existence. But, other objections aside, are not the grievances here complained of all the subject of an original bill instead of one not original? The fact that the Milwaukee and St. Paul Railway Company was formed by the purchasers at a sale under a decree of the United States court, does not make said company a ward of that court. It has no special privileges there, and owes that court no peculiar allegiance. John Doe, of Wisconsin, might have committed the same wrongs against the complainant that are alleged against this defendant; and in that case would it be contended that he

could be punished or those wrongs redressed except by an original suit? and if by an original suit, it could not be in the federal court, on account of the citizenship of the parties. So in this case. If the St. Paul Company have no title to this rolling-stock, as the complainant alleges, it is liable to an action at law for the taking; and the complainant, recognizing this as its true remedy, has brought its action of trespass on the case for this property in the circuit court for the district of Wisconsin, which is now pending there; not against the Milwaukee and St. Paul Company, because the citizenship of the companies would not allow it, but against the non-resident directors of that company, who directed the taking.

II.

It is not a supplemental bill, and cannot be sustained as such to the original foreclosure suit.

First, Because a defendant in an original suit cannot prosecute a supplemental bill properly so called.

Bills not original are divided into two classes—

1st. Such as are an addition to, or a continuance, or a dependency of the original bill; or

2d. Such as are brought for the purpose of cross litigation, or of controversy, or suspending or reversing some decree or order of the court, or of carrying it into execution.

Story's Equity Pleadings, § 326.

In one sense, all these bills are sometimes spoken of as supplemental bills; but, properly speaking, the term belongs only to the first class.

There can be no pretence that this bill belongs to the second class. It is not an attempt at cross litigation, nor does it in any manner fall within this class of bills.

Bills of the first class can only be brought by the complainant or those standing in his place, and cannot be brought by a defendant in the original suits. They are in the nature of an amendment to the original bill, and as no one but the complainant can amend a bill, so no one else can bring a supplemental bill of the first class.

White on Equity, 26 and 27.

Story's Equity Pleadings, §§ 330 to 337.

Bills not originally of the second class may be filed by the defendant, and the complainant has heretofore filed a bill of review in the original suit, which was dismissed on demur-

rer. It is now too late to file a cross bill at this stage of the proceeding.

Bronson and Soutter vs. La Crosse, &c., 2 Black, 539.

The counsel opposed in the court below cited § 337*a* of Story's Equity Pleadings as authority for a defendant to file a supplemental bill of the first class. It does not, however, sustain his position, but on the contrary clearly shows that the proceeding is one of defence to reverse an adverse decree, and in principle falls within the second class, as above stated.

It simply states that in cases of newly discovered evidence on the part of the defendant, he may take the proper steps to bring it before the court, and that will be by bill of review, supplemental bill in the nature of a bill of review, or petition for rehearing, according to the particular stage of the original suit when the discovery is made. The text says: "When the matter is newly discovered evidence on the part of the defendant, after the cause is at issue, or after publication is passed, or even after a hearing or decree, the defendant may, by a petition to file a supplemental bill, obtain relief so as to avail himself of the newly discovered evidence;" but not for any other purpose, and this only upon leave of the court first obtained.

The following authorities, and no others, are cited as sustaining the text:

Baker and Wife vs. Whiting, 1 Story, 218: "This was a petition by Whiting for a rehearing and for leave to introduce new evidence in the cause, and that if relief was not obtainable by rehearing, that he might proceed in some other and further manner in the nature of review." There had been a decretal order but no final decree in the cause, and in disposing of the application, on page 233, Justice Story says:

"The rule I take to be clear, that such a rehearing and such a supplemental bill will be granted only when the party could entitle himself to relief upon a bill of review or a supplemental bill in the nature of a bill of review, after a final decree."

In Standish vs. Radley, 2 Atkyns, 177, the defendant, after decree, discovered two releases and several receipts from the plaintiffs, and filed his bill, in the nature of a bill of review, to reverse the decree and obtain the benefit of the papers so found.

The case of Gould vs. Launer, 2 Atkyns, 533, was a petition for leave to file a bill of review, after decree, for errors of fact in the master's report.

In Barrington vs. O'Brien, 2 Ball & Beatty, 140: "After the decree had been pronounced, upon the first hearing of the cause, the defendant obtained an order for a rehearing, and also obtained liberty to put in issue, by a supplemental bill, several deeds not discovered by the agent for the defendant until after the publication of the depositions in the original cause, both causes to be heard together;" which was a proceeding merely in defence of the original suit.

Jenkins vs. Eldredge, 3 Story, 299, was a petition for a rehearing and for leave to file a bill in the nature of a bill of review, to bring before the court newly discovered evidence.

We therefore insist that said section 337*a* is no authority for this bill. That it is not an authority that a defendant may file a supplemental bill of the first class, but only such as are in their nature defensive, for the purpose of cross litigation, and in the nature of a bill of review, or for rehearing.

Second. A supplemental bill cannot be entertained in a case where the decree in the original action has been completely executed.

In the original cause the decree was made on the 13th day of January, 1862, and directed a sale of the mortgaged premises to satisfy the bonds secured by the mortgage. This decree was executed by the marshal on the 25th day of April, 1863, by a sale of all the mortgaged premises, which sale was confirmed on the 5th day of May, A. D. 1863. A conveyance by the marshal on the same day to the purchaser, and on the 12th day of June following full possession of the property so sold, was given to the purchaser under the order of the court.

Here the foreclosure suit ended. Bronson, Soutter, and Knapp had fully performed their trust, and as to this matter and their position as trustees were "*functus officio.*" They ceased from that time to be parties in court, and were no longer subject to its order.

They were no longer actors. Hence, there is no act of theirs to be restrained or controlled by the Court. Their appearance to this action cannot be compelled. Their solicitors in that suit have ceased to represent them, and service upon them would be no service upon Bronson, Soutter, and Knapp. The original action is not now pending in court. How, then, can supplemental proceedings be entertained against them? The federal court of Wisconsin has no jurisdiction as to them, and no means of acquiring it. There can be no supplement to a thing that is completely finished and ended. If this bill can now be entertained as a supple-

mental bill to that foreclosure, there would be no limit to such procedure, and we might well say that a chancery suit was never ended.

Supplemental bills are sometimes entertained for the purpose of procuring the execution of a decree, but in no case after execution done. The books furnish no such instance, and an attempt to sustain such a proceeding is an attempt to overturn all the well-settled principles of equity practice upon this subject, and, we venture to say, was never before entertained by any counsel possessed of a less brilliant and fertile imagination than the counsel opposed.

At the time of the commencement of this suit the complainants in the original suit had no sort of interest in or control over the mortgaged premises, and no decree that the court could render against them would have reached said premises. The original suit was as fully and completely ended as it ever will be, and the decree as fully and perfectly executed.

Third. The matters complained of in this bill are not supplemental but original; and can only be disposed of by original bill or by suit at law.

The interest acquired by the Milwaukee and St. Paul Railway Company by purchase under the original decree is not such an interest as can be brought into the original suit by supplemental bill. They are not purchasers, *pendente lite*, in the sense in which that term is used in regard to supplemental bills. The object of the foreclosure suit was the sale of the mortgaged property, and the purchaser took only such title as the decree, sale, and confirmation gave; and any dispute arising between such purchaser and any other party cannot properly be litigated in the original suit, but is the proper subject of an original proceeding, in which such purchaser must rely upon the title acquired by his purchase, and of this title any other court is equally competent to judge and determine as the court which rendered the original decree. The question as to whether the rolling-stock which was on the La Crosse road, on the 11th day of June, 1860, when the receivers took possession, was covered by and included in the land grant mortgage, must be determined from the terms of the mortgage and the facts and circumstances connected therewith; and whether it was or was not included in the decree of sale must be determined from the record. That it was sold by the marshal there is no dispute. The Milwaukee and St. Paul Railway Company has become the owner of all the property so sold by the

marshal. And the question as to whether the title so acquired is a good and valid one, or whether as to the rolling-stock it is defective, is not one that belongs exclusively to the circuit court for the district of Wisconsin. It is one depending upon law and fact which any court having jurisdiction of the parties may determine. If its title is challenged by any one not a citizen or corporation of the State of Wisconsin, it may be tried in that court, but not otherwise. It is not connected with Bronson, Soutter, and Knapp, and they are not necessary or proper parties to an action for that purpose. They do not claim any interest in or control over it; and there is no reason why the complainant should make these parties defendant, in its attempt to establish its right to this property, except that it is a mere subterfuge, to attempt thereby to confer jurisdiction on the Federal court, where otherwise the complainant would be compelled to litigate in the State tribunals.

The complainant insists that it had the right to bring this suit in the Federal court, for the reason that the decree directed, that of the rolling-stock purchased by the receiver there should be sold such proportion as the net earnings of the western division of said road bore to the eastern division; and that there had been no division of said rolling stock.

This fact does not alter the case or the rights of the parties. The court saw fit to order a certain specified interest in this rolling-stock to be sold—an undivided interest, which, in legal effect, is the same as though an equal undivided one-half, third, or any other interest had been ordered sold. It is not necessary, neither is it proper, that this interest should now be settled and determined in the original suit upon a supplemental bill. The original complainants have no interest whatever in the determination of this question. The Milwaukee and St. Paul Railway Company now have the entire interest so ordered sold; and when a division or separation of the common or undivided property is desired by any of the present owners, they have only to institute the proper proceedings in any court having jurisdiction of the parties to accomplish it. But it is not a supplement to the foreclosure suit, and the parties in interest in that suit as such have no interest in such division. The rolling-stock purchased by the receiver is in the place of money in his hands, and is to be disposed of in precisely the same manner. This is the disposition which the decree directs. There is no more necessity for a supplemental bill to dispose of

that than there is to dispose of the money still remaining in the receiver's hands.

The counsel admits that the division made by the decree is not binding upon the other mortgagees, and consequently this proceeding will not settle their rights. It is unreasonable that we should be called on to litigate this question without having all the proper parties before the court, so as to have a final settlement.

III.

If we were to admit this bill to be a proper supplemental bill as to Soutter and Knapp, survivors, still as to all the other defendants it is original; and whether it is a supplemental bill properly so called, or an original bill in the nature of a supplemental bill, or an original bill, the rule in regard to citizenship, in order to give this court jurisdiction, is the same as to all the new parties; it is an original bill as to them, and the court without jurisdiction, unless their citizenship is such as is required by the judiciary act to give this court jurisdiction in case of an original bill.

It is admitted that these two railroad companies, both being organized under the laws of Wisconsin, and having their principal place of business in that State, cannot litigate in this court on an original bill.

That this bill as to these parties is an original bill, we cite, Story's Equity Pleadings, S. S., 345, 346, 347, 348, 349, 350:

"Original bills are those which relate to some matter not before litigated in the court by the same persons, standing in the same interests."

Bills not original are those which relate to some matter already litigated in the court by the same persons, and which are an addition to or continuance of an original bill, or both.

Hatch vs. Dorr et al., 4 McLean, 112 Story's Equity Pleadings, sec. 16.

The Milwaukee and St. Paul Railway Company and Pratt and White are new parties; they have never litigated this question; consequently, as to them, this is an original bill, and this court cannot take jurisdiction. This precise question has been several times adjudicated by the Supreme Court of the United States and by the several circuit courts.

In Course et al. vs. Stead et al., 4 Dallas, 22, this precise point was raised in the Supreme Court. Certain aliens had recovered judgment against a citizen of Georgia, and proceedings had been instituted on the equity side of the court to reach his property in the hands of several parties, and a decree entered directing its sale. Subsequently a supplemental bill was filed against Elizabeth Course to reach property in her hands. The supplemental bill did not describe her as a citizen of the State of Georgia. In the Supreme Court it was objected that the court had not jurisdiction as to her for that reason. And in answer to this objection, Ingersoll, in support of the bill, said, *arguendo:*

"It is not necessary to describe the parties in the supplemental suit, which is merely an incident of the original bill, and must be brought in the same court."

But the Court held the objection well taken, and reversed the decree.

In Dunn et al. vs. Clarke et al., 8 Peters, 1, was a suit brought by citizens of Ohio against defendants of the same State, praying for an injunction to restrain the execution of a judgment in the same court against complainants, in ejectment, and also for a decree conveying to them the lands in question. The judgment had been recovered by a citizen of Virginia, who had died, and his interest had passed to Dunn, one of the defendants in the injunction bill. The court held that they had jurisdiction to restrain the execution of the judgment; but that as to the conveyance of the land the parties must go into the State court.

In Cross vs. De Valle, 1 Wallace, 14, the Court recognize this same doctrine.

In Tunstall vs. Worthington, 1 Hemstead, 662, Tunstall, a citizen of Arkansas, had recovered a judgment against Johnson, of Texas. On process issued on this judgment, Worthington, also a citizen of Arkansas, was summoned as garnishee, and answered, and issue was taken on his answer; and on the trial Justice Daniel held that the court had no jurisdiction. (See also Williams vs. Byrne et al, Hemstead, 472.)

The case of Freeman vs. Howe, 24 How., 460, is not in conflict with these authorities. It simply states that a bill filed to restrain or regulate judgments or suits at law in the same court, and thereby prevent injustice or an inequitable advantage under mesne or final process, is not an original suit.

This only has reference to restraining and controlling the

marshal in the execution of such mesne or final process, and has no reference to the settling the rights which parties may have acquired by the execution of such process.

Dunn vs. Clarke, 8 Peters, 1.

The other cases cited by the counsel in his brief are no authority for this bill. Hatch vs. Dorr, 4 McLean, 112, simply holds that a creditor's bill is the continuation of a suit at law, and that a change of residence after suit brought does not divest the court of jurisdiction. The case of Morgan vs. Morgan, 2 Wheaton, 290, holds that change of residence after suit brought does not divest jurisdiction. Mollan vs. Torrence, 9 Wheaton, 537, is to the effect that jurisdiction depends on the facts as they existed at the commencement of the suit. Logan vs. Patrick, 5 Cranch, 288, and Dunlap vs. Stetson, 4 Mason, 360, are to the effect that a bill filed to enjoin the execution of a judgment at law in the same court is not an original bill; and the case of Clark vs. Matthewson, 12 Peters, 164, is only to the effect that if a plaintiff dies after suit brought, and his administrator shall happen to be a citizen of the same State as the defendant, that the court would not thereby be ousted of jurisdiction, but such administrator could revive the suit.

No other cases are cited by the counsel in support of the jurisdiction in this case. These cases do not sustain it; but the cases cited by us above are directly in point against the counsel's position on this point.

We therefore insist that whatever may be the nature of this bill as to the original parties to the foreclosure suit, as to the new parties named it is an original bill, and the jurisdiction of the court depends upon the citizenship of the parties.

Judiciary act of 1789, sec. 11, 1 Statutes, page 78.

IV.

The La Crosse and Milwaukee Railroad Company was chartered in 1852 to build a road from Milwaukee to La Crosse.

Subsequently, in 1856, by chapter 517, Private Laws of 1856, page 1133, the La Crosse and Milwaukee Railroad Company was authorized to consolidate with the Milwaukee and Watertown Railroad Company. The two companies afterwards, and in 1856, consolidated, and all became the La Crosse and Milwaukee Railroad Company. At the same special session of 1856, the Legislature of Wisconsin con-

ferred upon said La Crosse and Milwaukee Railroad Company the land grant given by Congress to the State of Wisconsin, and authorized said company to build a road from Madison, by way of Portage City, to St. Croix river or lake, and thence to Superior and Bayfield, on Lake Superior. The Watertown road above mentioned is the present route of the Milwaukee and St. Paul Railway Company, from Milwaukee to Portage City. After the passage of all these acts, to wit, on the 31st day of December, 1856, said La Crosse and Milwaukee Railroad Company gave the said land grant mortgage to Bronson, Soutter, and Knapp. Therefore the Milwaukee and St. Paul Railway Company were fully authorized to connect said western division with said Milwaukee & Watertown, afterwards called the Milwaukee & Western Railroad Company's route, the present line of the Milwaukee & St. Paul Railway Company.

V.

All the rolling-stock which was on the La Crosse and Milwaukee railroad on the 11th day of June, 1860, when the receiver took possession, was covered by and included in the land grant mortgage to Bronson, Soutter, and Knapp; and by the sale under that mortgage it passed to and is now owned by the Milwaukee and St. Paul Railway Company, subject to the lien of mortgages given by the La Crosse company prior in date to the 31st day of December, 1856, the date of the land grant mortgage.

The La Crosse and Milwaukee Railroad Company was but one corporation, one legal existence, and as such owned all its property, both real and personal.

It was originally chartered to build, and in fact did build, but one line of road, that from Milwaukee to La Crosse. By the Legislature of 1856 it was consolidated with the Watertown, and also authorized to build a road from Madison, by way of Portage city, to St. Croix, sixty-one miles of which was a common line with the original La Crosse. Hence the word *roads* is used in the land grant—Bronson, and Soutter, and Barnes mortgages. But the La Crosse company, in fact, never built any other road except its original line from Milwaukee to La Crosse, which, at the time the receiver took possession, was used and operated, and always had been operated, as one through and continuous line of road, and all belonging to one company and in the same right. All of its rolling-stock was purchased for

and owned by this company, and it was *all purchased for and used on* the entire length of road without any division or separation. The complainant's bill does not pretend to allege anything different; and the fact that a railroad company's rolling-stock is common to its whole line, and does not belong to a particular part thereof, is a matter of common observation and knowledge, of which the court is bound to take notice, as the common rule in all such cases.

There never was any division of this road for any purpose whatever, except the company, for convenience of raising funds, made their first mortgage of the east 95 miles, and subsequently mortgaged the west 105. The entire road belonged to the same company, and so did its rolling-stock. We contended below that the rolling-stock in its nature was personal property; but the court held it was so far a fixture that the mortgages would hold it, but not one word that it belonged to one end of the road in preference to the other. This road, so owned, in the process of being constructed and built, was, from time to time, mortgaged as follows:

1st. A mortgage on 95 miles to Palmer.

2d. A mortgage on 18 miles to Milwaukee city.

3d. A mortgage on 40 miles to Milwaukee city.

4th. A mortgage on 105 miles to Bronson, Soutter, and Knapp.

5th. A mortgage on 95 miles to Bronson and Soutter.

6th. A mortgage lease on the whole road to Chamberlain.

7th. A mortgage on 105 miles to Helfenstien.

8th. A mortgage on the whole road to Barnes.

The 1st, 2d, 3d, and 5th were on the eastern 95 miles of the road, or of parts thereof; the 4th and 7th were on the west 105.

All of these mortgages, in express terms, covered the rolling-stock of the road.

In the land grant mortgage it is described as "All and singular the locomotive engines and other rolling-stock, and all other equipments of every kind and description, which have already been or may hereafter be procured for or used on said roads, or either of them, and all the materials, tools, implements, utensils, and other personal property, which have been or may hereafter be procured for or used in connection with said roads, or either of them." (See Record, p. 47.)

The description in the Bronson and Soutter or 2d mortgage, is in precisely the same language. (See Record, p. 52.)

The same language is used in the Barnes mortgage, both

in the original and supplemental mortgages. (See Record, pp. 18 and 30.) And although it does not appear from this Record, it will be found that the same language is used in the Helfenstien mortgage. (See p. 29 of printed Record of No. 371 of this term.)

There can be no doubt that these descriptions were copied the one from the other, and that in making these several mortgages the same identical rolling-stock was intended to be conveyed, to wit, the rolling-stock of the La Crosse company used on its road. At the time the land grant mortgage was executed, no part of the line of road described in said mortgage was built, and there was no rolling-stock on that line. Hence, if the counsel's idea is to prevail, there was no propriety in granting rolling-stock *already procured.* That expression could only refer to the rolling-stock then owned by the company, and which was in use on their eastern division.

The counsel labors through over thirty pages of his printed brief to try and establish the proposition that the rolling-stock of this company was divided and subdivided to certain portions of the road, and that it was a fixture and belonged to such particular subdivisions, instead of being the property of the company used on the whole road; and finally arrives at the comforting conclusion, to himself, that only forty box cars were "ever procured for or used on" the western or land grant division. The absurdity of this position will at once appear if we reflect for a moment that this two hundred miles of road was a great through route, operated as one road, and that while the company owned over $600,000 of rolling-stock, that it was *all kept, procured for, and used on the eastern 95 miles exclusively,* except 40 box cars which were used on the western 105 miles. He does not inform us how these forty box cars were propelled, or in what way the freight and passenger business was done. It will not answer for him to say that any part of this rolling-stock, claimed by him, was used on this western division, because if it was the property of the La Crosse company and "*used on or in connection with the western division, it was covered by our mortgage in express terms.* A proposition so utterly absurd as that contended for by the counsel needs no other refutation than its simple statement.

We therefore insist:

1st. That each one of these several mortgages covered and included all the rolling-stock belonging to the La Crosse

and Milwaukee company, and which had been procured for or used on said railroad from Milwaukee to La Crosse.

2d. That this is equally so, whether we regard said rolling-stock as personal property or a fixture or accession or incident to the road, and that if it is to be considered as a fixture or accession or incident, it is only so as respects these mortgagees as against other creditors, and that there is no pretence that it is a fixture to any particular portion or mile or miles of the road.

3d. That these several mortgages became a lien upon said rolling-stock from the date of their execution, and that said liens have priority now in the order of time of their execution, except as they may have been affected by the statute requiring the filing of personal mortgages, in case the rolling-stock is to be considered personal property.

4th. That the La Crosse and Milwaukee Railroad Company, after giving these mortgages, could not be heard to dispute the right of any one of the mortgagees to all of this rolling-stock; and as the mortgage to Barnes is, by its terms, expressly made subject to all the other mortgages except the one to Chamberlain, the Minnesota company stands in no better position than would the La Crosse company, and is therefore estopped to dispute our title.

Hence, if we were now before this court to have our rights declared under the mortgage, and there had been no foreclosure, our mortgage would be decreed a lien upon all of said rolling-stock which was on the road when the receiver took possession.

But it is claimed by the counsel that the district court determined in the land grant foreclosure suit that all the rolling-stock except forty box cars belonged to the east division, and that we are bound by that determination, notwithstanding our mortgage did cover the whole rolling-stock.

We deny that any such decision was ever made in the district court. There was no such contest in the district court. There was no party in that Court who did claim or who was bold enough to claim what the counsel here asserts, to wit, that the right of the La Crosse and Milwaukee Railroad Company to any part of the rolling-stock on that road was superior to the right of any one of the several

mortgagees thereof. But the only question in this regard that was before that court was one of priority of these mortgages as to said rolling-stock.

Upon this question the district court first decided that this rolling-stock was so far a fixture that it ought to be held by the mortgages, as pledged to secure the payment of the bonds upon which the money was raised to procure the rolling-stock and build the road, and thereupon the court say: "From the best consideration I can give the subject, *I think the rolling-stock on the whole road is to be considered to be a fixture, and is pledged to the first mortgage of* $950,000, unless it can be shown affirmatively how much or what portion was procured by funds received out of the issue of land grant bonds and the second mortgage bonds, or either of them.

Again the judge says: "*The first mortgage covered all the after acquired rolling-stock, except such as should be proven to have been purchased with funds raised upon subsequent mortgages; to that extent, those mortgages should have a superior equity.*"

These are the decisions and instructions of the judge, clearly holding that *all the rolling-stock of the entire road and all after acquired rolling-stock* was pledged to the first mortgage, but not that it belonged to the east division, or that the subsequent mortgages did not cover it, and clearly showing that the only question that was before him was one of priority of lien, and not of location on the road of the rolling-stock.

Having decided that the rolling-stock, as respected the mortgages, was a fixture, and that it was all pledged to the first mortgage, unless it was affirmatively shown that the funds to purchase it were furnished by the other mortgages, in which case the subsequent mortgages were to have a preference to that extent, he made an order of reference to ascertain this fact.

The masters, acting under and guided by his opinion, as above, made their report that forty box cars were purchased by the funds of the land grant mortgage, and belonged to that mortgage; that no part of the rolling-stock was purchased by the funds of the second mortgage, and then, forgetting the instructions of the court, reported that all the rolling-stock except said forty box cars belonged to the first mortgage and to the second mortgage. This report, so far as the second mortgage was concerned, was not in accordance with the principles laid down by the judge in his opinion, under which the masters were acting, and was an evident attempt to make the second or Bronson and Soutter

mortgage a lien on all of said rolling-stock, prior and superior to the land grant, or upon the idea that the land grant was to be excluded altogether.

This report was excepted to, and the land grant mortgagee then insisted that it was a first lien on all the rolling-stock, and based their claim upon the fact that the rolling-stock is personal property, that the first mortgage was not filed as a chattel mortgage, and was therefore void as to the rolling-stock, and that this mortgage was the first in date after the act of October 10, 1856, declaring rolling-stock a fixture so far as to pass by mortgage.

The court over-ruled this exception and repeated in substance its former opinion and decision, and, on this exception, modified the report of the masters so far as to strike out that part of it which stated that "all the rolling-stock except the forty box cars and the proportion of that purchased by the receiver, was covered by the Bronson and Soutter or second mortgage;" thus leaving the report to stand as directed in his opinion and instructions to the masters, that the first mortgage included all the rolling-stock except what the masters had found was purchased with the funds of the subsequent mortgages, as to which amount the subsequent mortgages were entitled to preference over the first mortgage.

We therefore insist that the question settled by the district judge was one of priority of lien and not the extent of the lien of the land grant mortgage.

The district court afterwards made its decree of foreclosure and sale in the land grant case, and directed a sale of all the rolling stock on the road as described in the mortgage. And after giving the description as contained in the mortgage, specially described this portion, which, by this reference, the land grant had been found to be a first lien upon, and followed that with the adjudication that "*the remaining rolling stock is subject to prior mortgages.*"

This we insist was a decree to sell all the rolling stock thus specially described, free and clear from all incumbrance, for the court had decreed, as to that, that our mortgage was a first lien, and all the remainder of the rolling stock subject to incumbrances prior in date to the land grant mortgage.

The Marshal so understood, and his advertisement of sale so expressly stated. The sale was so made and reported to the district court, distinctly setting forth that the portion of rolling stock specially named was sold free and clear

from all incumbrance, and all the remainder subject to the lien of mortgages prior in date to the 31st day of December, 1856. See Record, 83 and 84.

The sale was then, on full hearing of all the parties, *confirmed as made.* The deed of the Marshal to the purchaser, and from the purchaser to the Milwaukee and St. Paul Railway Company, was of the property as sold.

Afterwards, on the 7th of May, 1863, the Milwaukee and St. Paul Railway Company applied to the court to be let into possession of the property which it had purchased, and the court on that day gave them possession jointly with the receiver of the western division, and the property purchased free and clear of all incumbrances, and then directed the receiver to make a full and perfect inventory of all personal property on the road and file it by the 8th of June then next, and further directed that the receiver should continue to receive all the revenues of the road, and adjourned the further hearing of the application to the said 8th of June; on which day, after full hearing, the court directed the receiver to deliver to the St. Paul company, as purchasers, the western division, the rolling stock specially named in the decree, and also subject to other or previous liens or claims, the possession of the rolling stock on hand when the receiver took the same under the order of the court, and directed the receiver as to said western division to be discharged, subject to the settlement of his account.

Of the property so delivered, the Milwaukee and St. Paul Railway Company took possession as owner, as to all of said rolling stock, however, not specially mentioned in the decree, subject to the liens of mortgages prior in date to the 31st day of December, 1856.

We therefore insist that the land grant mortgage covered all this rolling stock.

That the proceedings in the foreclosure suit so adjudicated; but, that, as to all except that specially described in the decree, our lien was subject to the lien of mortgages prior in date to the land grant mortgage.

That it was sold by the Marshal and the sale confirmed as made.

That in pursuance of said decree, foreclosure, and sale, it was by order of the court delivered to the Milwaukee and St. Paul Railway Company, and that said company is now the owner thereof, subject to prior mortgages, as above stated.

In order that the court may have before it, in as compact

a form as possible, the title of the Milwaukee and St. Paul Railway Company to this rolling stock, I shall here present the substance of the Record upon which we rely.

The foundation of our title is the land grant mortgage given by the La Crosse and Milwaukee Railroad Company to Bronson, Soutter and Knapp, and bearing date December 31, 1856, the granting clause of which is as follows:

Description of Premises included in Land Grant Mortgage.

All and singular the several tracts, pieces, or parcels of land which now are or may hereafter be or constitute the site of the roadway, turnouts, engine-houses, workshops, depots, and other buildings, and all the other lands and real estate which now constitute or may hereafter constitute or be a part of the roads of said railroad company from Madison by way of Portage City to the St. Croix river or lake between townships twenty-five and thirty-one, and from Portage City to La Crosse; and also all and singular the superstructure of said roads, whether now made or to be made hereafter, and all the engine-houses, workshops, depots, and other buildings, and all the other improvements on or pertaining to said roads, whether now built and made, or to be built and made hereafter. And also all and singular the locomotive engines and other rolling stock, and all the other equipments of every kind and description which have already been or may hereafter be procured for or used on said roads, or either of them, and all the materials, tools, implements, utensils, and other personal property which have been or may hereafter be procured for or used in connection with said roads, or either of them.

And also all and singular the rights, liberties, privileges and franchises of said railroad company of every kind and description relating to said roads. Also all and singular the lands granted or intended to be granted to said railroad company, under or by virtue of the act of Congress and the act of the Legislature of Wisconsin hereinbefore mentioned, so far as the said lands pertain or are applicable to the construction of said roads from Madison, by way of Portage City, to the St. Croix river or lake, estimated to be about one million of acres of land; together with all and singular the hereditaments and appurtenances belonging or in any wise appertaining to the lands and real estate conveyed or intended to be conveyed. *And it is hereby declared to be the intention of the parties to these presents to convey to and vest in said parties of the second part all the property, real and personal, of said railroad company to be acquired hereafter, as well as that which has already been acquired, together with all the rights, liberties, privileges and franchises of said railroad company in respect to the roads above mentioned, as fully and amply as the same might be conveyed if the said railroad had already been constructed and equipped, and the particular lands granted by the foregoing acts of Congress and the Legislature, so far as the same are applicable to the construction of said road from Madison to St. Croix river or lake, had already been designated and conveyed to said railroad company.*

Record, page 47.

It will be seen that this description includes not only all rolling stock which had been or might thereafter be procured for or used on said roads, but also declares it to be the intention of the parties to said mortgage to convey to and vest in the trustees all the property, real and personal, of said railroad company to be acquired thereafter, as well

as that which had already been acquired. This clause is, then, followed by the grant of the franchise, as follows: "Together with all the rights, liberties, privileges, and franchises of said railroad company, *in respect to the roads above mentioned as fully*," &c.

These are the words of the statute of Wisconsin authorizing a railroad company to mortgage its franchise, and we submit have reference only to the grant of the franchise; and that it was the intention of the company to convey the real estate described, and all the personal property acquired, or to be acquired, by said company.

December 5th, 1859, Bronson, Soutter and Knapp filed their bill to foreclose this mortgage, making the Minnesota company a party defendant. Said company made default, and the bill was brought on to a hearing on pleadings and proofs as to the other defendants, on the 6th day of February, 1861. And afterwards, on the 11th day of March, the following opinion was given by the district judge:

* * * * * * * * * *

The legislation of this State was evidently with the view of enabling railroad companies, and especially the La Crosse and Milwaukee Railroad Company, to raise money in advance, by bonds and mortgage, for the purpose of building their roads, and procuring rolling stock. The Directors of this company were given almost unlimited license to make bonds and mortgages, payable in any manner they might deem proper, and to pledge or mortgage their property as security. By the terms of the mortgages, the rolling stock to be procured was pledged to secure the debt contracted for raising the means of its procurement. In equity, those pledges should be sustained, and the persons who purchased the company's bonds and furnished the means for the procurement of the stock should be protected. And they also furnished the means for building the road, from which revenues have been derived to enable the company to procure rolling stock.

From the best consideration I can give the subject, I think the rolling-stock on the whole road is to be considered a fixture, and is pledged to the first mortgage of nine hundred and fifty thousand dollars, unless it can be shown affirmatively how much or what portion was procured by funds received out of the issue of land grant bonds and the second mortgage bonds, or either of them. So much of the stock as can be shown to have been procured out of either of those issues, or out of the revenues of so much of the road as was built with funds arising out of those issues of bonds respectively, will pass with the sales on said mortgages. The first mortgage is a lien on the road and fixtures from Milwaukee to Portage City. It was the first pledge of the road and fixtures to creditors. And I apprehend it is the conveyance of the franchise of the corporation granted by its charter; as it is not probable that the corporation could divide its franchises by making mortgages of several parcels of the road and property. That would be creating several corporations by deed of a company to which the Legislature granted but one.

(See appellant's brief, page 9.)

This opinion decides, first, that the rolling stock was pledged by the terms of the mortgage to the parties, who

had furnished money on its bonds, and in equity that pledge should be sustained. This is said not of the first mortgage, but generally in regard to the legislation and proceedings of the La Crosse company, and is just as applicable to the bondholders under any other mortgage, as the Palmer mortgage; second, it decides the rolling stock on the *whole road* is a fixture and pledged to first mortgage, unless it was made to appear affirmatively that it was purchased by the proceeds of subsequent mortgages, and in that case such subsequent mortgage would have a superior equity to the first as to so much.

It does not decide that the rolling-stock on the whole road is a fixture to the east division, as claimed by the counsel, but a fixture of the road. It decides that the Palmer mortgage was the *first* pledge of the road and fixtures to creditors. Not that the rolling stock was not included in the other mortgages, but, by implication, admits it was included; and the whole inquiry was as to which of the mortgages was the first lien. The claim of the counsel, on page 10 of this brief, that "this opinion determines that the rolling-stock is all to be regarded a fixture upon the eastern division," is entirely unwarranted by the opinion or the circumstances under which it was given, but on the contrary is an entire misrepresentation and perversion of its true meaning.

This opinion is of considerable length, and disposed of all the matters necessary to enable the masters to make their report, (and may be found at page 227 of No. 280 of this term, and not at 218 as stated in the counsel's brief; the opinion on page 218 is in the Bronson and Soutter case.) Immediately after delivering this opinion the order of reference was made as follows:

This day came the parties, by their counsel, and on consideration of the pleadings, proofs, and the arguments of counsel, it is ordered by the court that reference be and hereby is made to Winfield Smith, a master, and to Jerome R. Brigham and Joshua Hathaway, special masters, to ascertain and report the amount of interest due and unpaid on the bonds described in the mortgage or deed of trust, and the real amount of said bonds.

And the said masters shall ascertain and report the amounts of the several judgments of Newcomb Cleveland, Sebre Howard, and of Graham & Scott.

And it is further ordered that the said master report the amount of the several specific claims of Selah Chamberlain, and also an account of his receipts, set-offs, and credits, and of such as should be made to his claims, including his receipts of revenues of the whole road, without regard to its divisions by the mortgages. And that they may examine the said Chamberlain under oath, and require him to produce his books, and they may also take additional testimony to that on file.

And it is further ordered that the said masters ascertain and report the

whole amount of rolling-stock on the road, and that they specify the quantity thereof that is covered by and included in this mortgage. And also in the first and second mortgages, respectively.

March 21, 1861.—Ordered by the judge that Increase A. Lapham be and hereby is appointed a special master in this case, in the place of Joshua Hathaway, who declined serving.

See Record, pages 71 and 72.

It will be seen by this order of reference, among other things, the masters "were to ascertain and report the whole amount of rolling-stock on the road, and that they specify the quantity thereof that is covered by and included in this mortgage. And also in the first and second mortgages, respectively."

The counsel opposed says, "these orders of reference are to be read in the light of the preceding opinion." Now, what was the object to be attained by them?

The court had just decided that the rolling-stock on the whole road is to be considered a fixture, and pledged to the first mortgage, unless it was affirmatively shown that some portion of it was procured by funds received out of the issue of land grant bonds, or the second mortgage bonds, and in that case, and to that extent, they would have a preference to the first mortgage.

This opinion was the instruction to the masters, and on this point they could only inquire as to whether any portion of this rolling-stock was purchased with the funds of these subsequent mortgages, and report as they found that one fact.

They had no right to inquire or report generally as to what was covered by the land grant, but simply what of this rolling stock was purchased with the funds of the land grant. Their report, therefore, has no significance beyond establishing the simple fact that it did not appear affirmatively to them that only forty box cars were purchased by the land grant bonds.

Report of Masters—Extract.

We have also ascertained the whole amount of rolling stock on the whole road at the cost price. The amount thereof was, at the date of the filing of the bill of complaint in this cause, five hundred and sixty-nine thousand six hundred and thirty-five dollars and seventy-eight cents, and an additional amount of fifty-three thousand six hundred dollars has been purchased since the filing of the bill of complaint, making the whole amount $623,235 78.

And we have ascertained and do further report that of the said rolling stock, forty box cars, amounting at the cost price thereof to thirty-one thousand nine hundred and seventy-nine dollars and sixty-four cents, and num-

bered 330, 332, 334, 336, 338, 340, 342, 344, 346, 348, 350, 352, 354, 356, 358, 360, 362, 364, 366, 368, 370, 372, 374, 376, 378, 380, 382, 384, 386, 388, 390, 392, 394, 396, 398, 400, 402, 404, 406, and 408, are covered by and included in the mortgage, executed to the complainants as set forth in the bill of complaint in this cause; the said cars having been purchased with and by the proceeds of a portion of the bonds to which this mortgage is collateral; and all the remainder of the said rolling stock is covered by and included in the first mortgage upon the said railroad, and in the mortgage executed to Greene C. Bronson and James T. Soutter, and bearing date on the seventeenth day of August, A. D. 1857.

See Record, page 76.

The masters report, as belonging to the land grant, forty box cars, because they were purchased with the funds of the land grant, but in regard to the Bronson and Soutter mortgage, the masters appeared to forget their instructions, and assumed to report generally as to what was covered by it, which the court corrected.

The Palmer and city mortgages were made in 1854. At that time there was no statute of Wisconsin defining the character of rolling stock, and whether it was a fixture or personal property depended upon the rules of the common law. On the 10th day of October, 1856, the legislature passed an act concerning railroads, the first section of which provided that—

Any railroad company may borrow such sum or sums of money, at such rates of interest and upon such terms, as said company or its board of directors shall authorize and agree upon and may deem necessary or expedient, and may execute one or more trust deeds or mortgages or both as occasion may require, on any railroad or railroads constructed or in process of construction by said company, for the amounts borrowed or owing by such company, upon such interest and in such manner as such company or its board of directors shall deem expedient, and such company may make such provisions in such trust deeds or mortgages for pledging or transferring their railroad track, right of way, depot grounds, rights, privileges, franchises, immunities, machine houses, rolling stock, furniture, tools, implements, appendages, and appurtenances belonging to or used in connection with such railroad or railroads in any manner whatsoever as security for any bonds, debts, or sums of money that may be secured by such trust deed or mortgage as they shall think proper.

The 2d section provided that—

All rolling stock of any railroad company used and employed in connection with its railroad, shall be, and the same are hereby declared to be, fixtures, and all such property, and all additional right of way, depot grounds, and other real property acquired subsequently to the execution of any such trust deed or mortgage which may be described or provided for therein, shall be subject to the same lien as is created by such trust deed or mortgage upon the property therein described, to which such company had title at the time of its execution, &c.

Session laws of Wisconsin for 1856, pages 213, 214, and 215.

The law of Wisconsin requires mortages of personal property to be filed in the town clerk's office and not in the office of register of deeds, where real estate mortgages are recorded.

Revised Statutes of 1849, page 389, sec. 9.
Same provision in Revised Statutes of 1858, page 614, sec. 9.

And in case personal mortgages were not so filed they were void as to all persons except the parties thereto.

Revised statutes of 1849, page 389, sec. 9.
Revised Statutes of 1858, page 614, sec. 9.

The Palmer and city mortgages were never filed as mortgages of personal property as required by the statute, and the land grant mortgage was the first mortgage ever executed by the La Crosse Company after the passage of the act of October 10, 1856.

On the coming in of the master's report, the counsel for the land grants attempted to insist upon the claim that the land grant mortgage was a first lien upon all the rolling stock, prior and superior to all other claims, for the reason that rolling stock was personal property when said prior mortgages were executed, and they had not been filed as required by law; hence the peculiar form of the exception setting forth what they should have done—which exception is as follows:

The Complainant's Exceptions to the Report—Extract.

4th. For that the said master and special masters have in and by their said report certified that all the rolling stock on said road (except 40 box cars which are specially named in said report) was covered by and included in the first mortgage upon the said railroad, and in the mortgage upon the said railroad executed to Greene C. Bronson and James T. Soutter, and bearing date on the 17th day of August, A. D. 1857.

Whereas the said master and special masters ought to have certified that all the rolling stock on said road (except that purchased by the receiver since the commencement of this suit, amounting to the sum of $53,600) was covered by and included in the mortgage given to the said complainants, and described in the bill of complaint in this cause, and that said mortgage was a first and prior lien on said rolling stock, superior to all other liens; and that as to the rolling stock purchased by said receiver above mentioned, 105-200 thereof was covered by the mortgage described in the complaint, and that to that extent the complainant's said mortgage was a first lien thereon.

Record, p. 77.

The counsel in his comments on this exception, and in a great number of other places in his brief, asserts that it was

agreed, or all understood, "*that what was included in and covered by one mortgage was not included in and covered by the other.*"

When in truth and in fact no such thing was ever agreed upon, understood, or imagined. This exception negatives any such idea. The opinion of the court, the decree, and subsequent orders all show that such was not the understanding of any of the parties to the litigation at that time. But the counsel has himself introduced into his brief the opinion of the court on the hearing of the exceptions of the land grants, and I am willing to leave the question as to what was claimed by the land grants to that, which is as follows:

Extract from Opinion of the Judge on hearing exceptions and directing entry of final decree.

In obedience to the order of reference, the masters inquired into the quantity of rolling stock covered by this mortgage. They report that forty box cars, costing thirty-one thousand nine hundred and seventy-nine dollars and sixty-four cents, giving their respective numbers, were purchased with funds raised on the bonds in this mortgage. They also report that the rolling stock on the road cost $623,235 78; and that all but those box cars are covered by the first and second mortgages. The complainants except to this part of the report, and claim the whole rolling stock. They found their claim upon the grounds that the rolling stock is personal property, and that the first mortgage was not filed as a chattel mortgage, and is therefore void as to the rolling stock. And that their mortgage was the first in date, after the act of October 10, 1856, declaring rolling stock to be real property. I do not think the statute for filing chattel mortgages is applicable to this species of property in actual use upon a railroad.

The legislation of this State was evidently with a view of enabling railroad companies, and especially the La Crosse and Milwaukee Railroad Company, to raise money in advance, by bond and mortgage, for the purpose of building their roads, and procuring rolling stock. The directors of this company were given almost unlimited license to make bond and mortgage payable in any manner they might deem proper, and to pledge or mortgage their property as security. By the terms of the mortgage, the rolling stock to be procured was pledged to secure the debt contracted for raising the means of its procurement. In equity, those pledges should be sustained, and the persons who purchased the company's bond and furnished the means for the procurement of the stock should be protected. And they also furnished the means for building the road, from which revenues have been derived, to enable the company to procure rolling stock. This matter is fully settled as authority to this court in the case of Pennock *vs.* Coe, 23 Howard, 117. The rolling stock was procured by the company as owners, and adapted to the road as the means of operating; and so long as it is thus used it should be considered as fixtures, even without statute law. The first mortgage covered all the after acquired rolling stock, except such as should be proven to have been purchased with funds raised upon subsequent mortgage; to that extent those mortgages should have a superior equity. For these reasons the exception will be overruled. But the decree will, in addition to the forty cars reported by the masters, allow to this mortgage, its share of the rolling stock, purchased and procured by the receiver, costing $147,942, in proportion to the net revenues.

Appellant's brief, 16 and 17.

This opinion shows that the land grant mortgage claimed to have the first lien upon this rolling-stock, not because it belonged either to the eastern or western division, and not because it was not included in the Palmer mortgage by its terms, but because, without a statute, it was personal property—that there was no such statute when the Palmer mortgage was given, and that it had never been filed as a mortgage of personal property, and therefore that the land grant mortgage, which was given after the passage of a law making it a fixture, was entitled to claim it on the ground that the Palmer mortgage had never been filed as a personal property mortgage, as required by the law of Wisconsin. The judge held it a fixture without a statute, and that it was not necessary to file the Palmer mortgage as a chattel mortgage. He then repeated in substance his former opinion, and stated, "that, for these reasons, the exception is overruled." The whole reasoning of the opinion is to the effect, if it had been necessary to file the Palmer mortgage as a mortgage of personal property, that our claim would have been the first lien. There was no pretence but what the land grant mortgage was a lien upon the rolling-stock subject to the prior mortgages, therefore that point was not discussed. It was wholly in regard to who had the first lien.

The counsel then says that "from this opinion it resulted logically and necessarily that all the rolling-stock except *forty box cars* was to be regarded as fixture upon the eastern division,** but that the second or Bronson and Soutter mortgage should not be allowed to cover any of the rolling-stock, because none of the bonds secured by that mortgage had been used for the purchase of it." Does any one believe that any intelligent court ever made such a decision—first, that certain things were fixtures to real estate; and then that a mortgage, by its express terms purporting to convey *said real estate and fixtures*, did not, in fact, convey the fixtures? Yet the counsel's logic forces him inevitably to that conclusion.

He is driven to this strait by his persistent effort to show that when the court decided that all the rolling stock, except, &c., was included in the first mortgage, that that was a decision that it was all a fixture on the eastern division. But as the court modified the masters' report, wherein they stated that the rolling stock was covered by the Bronson and Soutter mortgage, he is bound to acknowledge that that mortgage, by the decision of the court, covers no rolling stock. Such is the result of attempting to wrest a decision

from its plain and legitimate intent and purpose. And the answer to it is, that the object of the reference was not to ascertain the division of the rolling stock between the eastern and western divisions—a division which never existed—but simply to ascertain what and how much rolling stock was purchased by the proceeds of the land grant and Bronson and Soutter mortgages, in order that as to that amount they might have a preference over the first mortgage; and as the masters did not report that any portion of the rolling stock was purchased by the second mortgage bonds, they should not have reported that any of the rolling stock belonged to it, or in other words that it was a first lien upon any of it.

Order of Court upon the Exception of the Land Grant Mortgage.

And it is further ordered by the court, that the fourth exception of complainants be and is hereby overruled as to the forty box cars which are covered by this mortgage. And it is further ordered by the court, that on said exception the said report be so modified that all the other rolling stock that was on said road when the receiver was appointed, except the said forty box cars, is covered by and included in the first mortgage of the road from Milwaukee to Portage City; and that all the rolling stock on said road that has been purchased or procured since the court has held possession by its receiver, costing $147,942 63, be applied to the said first mortgage, and the mortgage in this bill, in proportion to the net revenues on such portions of the road said mortgages respectively covered, since the appointment of the receiver.

Record, 78.

The comments of the counsel on this order on page 20 of his brief are among his best efforts, and need no reply.

The court having thus ascertained and determined, according to the principles laid down in its opinion, the amount of the rolling stock upon which the lien of the land grant mortgage was prior and superior to the Palmer mortgage, and also that the second or Bronson and Soutter mortgage was not a first lien, or entitled to priority over the other mortgages, as to any part of the rolling stock, on the same day made its decree of foreclosure and sale in the ordinary form, the description of the property ordered to be sold being as follows, to wit:

The description of the property authorized to be sold under and by virtue of this decree, so far as the same can be ascertained from the mortgage above referred to or from the bill of complaint in this cause, is as follows, viz:

All and singular the several tracts, pieces or parcels of land which now are, or may hereafter be or constitute the site of the roadway, turnouts, engine-houses, workshops, depots, and other buildings, and all the other lands and real estate which now constitute or may hereafter constitute, or be a part of

the roads of said Railroad Company from Madison, by way of Portage City, to the St. Croix river or lake, between townships twenty-five and thirty-one, and from Portage City to La Crosse; and also all and singular the superstructure of said road, whether now made or to be made hereafter. And all the engine-houses, workshops, depots, and other buildings, and all the other improvements on or pertaining to said roads, whether now built and made, or to be built and made hereafter. And also all and singular the locomotive engines and other rolling stock, and all the other equipments of every kind and description, which have already been, or may hereafter be, procured for or used on said roads, or either of them, and all the materials, tools, implements, utensils, and other personal property, which have been, or may hereafter be, procured for or used in connection with said roads, or either of them. And also all and singular the rights, liberties, privileges, and franchises of said Railroad Company of every kind and description relating to said road.

Also all and singular the lands granted or intended to be granted to said Railroad Company, under or by virtue of the act of Congress and the act of the Legislature of Wisconsin hereinbefore mentioned, so far as the said lands pertain or are applicable to the construction of said roads from Madison, by way of Portage City, to the St. Croix river or lake, estimated to be about one million of acres of land, together with all and singular the hereditaments and appurtenances belonging or in any wise appertaining to the lands and real estate hereby conveyed or intended to be conveyed; and it is hereby declared to be the intention of the parties to these presents to convey and to vest in said parties of the second part all the property, real and personal, of said Railroad Company, to be acquired hereafter, as well as that which has already been acquired, together with all the rights, liberties, privileges, and franchises of said railroad company, in respect to the roads above mentioned, as fully and amply as the same might be conveyed if the said railroads had already been fully constructed and equipped, and the particular lands granted by the foregoing act of Congress and the legislature, so far as the same are applicable to the construction of said road from Madison to St. Croix river or lake, had already been designated and conveyed to said railroad company.

With forty box cars, numbered 330, 332, 334, 336, 338, 340, 342, 344, 346, 348, 350, 352, 354, 356, 358, 360, 362, 364, 366, 368, 370, 372, 374, 376, 378, 380, 382, 384, 386, 388, 390, 392, 394, 396, 398, 400, 402, 404, 406, and 408, and such portion or share of rolling stock purchased and procured by the receiver, costing one hundred and forty-seven thousand nine hundred and forty-two dollars and sixty-three cents, as the net revenues of the portion of road covered by this mortgage bears to the balance or other end of the road since the appointment of the receiver. The remaining rolling stock is subject to prior mortgages.

The property here ordered to be sold by this decree is that granted by the La Crosse Company to Bronson, Soutter and Knapp. The description in the decree is word for word the description in the mortgage, and in terms includes all the rolling stock of the La Crosse road. This description is followed, by way of explanation, with a particular description of the forty box cars, and the proportion of the rolling stock purchased by the receiver, upon which the court by its previous proceedings had determined that the lien of this mortgage was prior and superior to all other mortgages. And immediately following is the direction, explanation or adjudication, that "*the remaining rolling stock is subject to prior mortgages.*"

What are we to understand from this language? The description certainly covers all the rolling stock on the road when the receiver took possession. This the counsel opposed acknowledges in substance when he comes to speak of the sale by the marshal. The direction is to sell all the rolling stock included in this description, which is all the rolling stock of the road; but the court by its previous adjudications had determined that all this rolling stock, except a certain amount, was included in the Palmer mortgage, and that it was a first lieu upon it. As to that excepted, it had decided that this mortgage had a preference to the Palmer mortgage. Hence the court first directed a sale of the whole, then names this portion upon which the lien of this mortgage is superior, and directs all the remaining rolling stock sold subject to prior mortgages. Now, what is meant by the *remaining rolling stock?* Surely it must mean that included in the general description first given, and not included in the subsequent special description. There can be no other reasonable construction of this language. The counsel on page 24 of his brief insists that "the adjudication that the *remaining rolling stock* was subject to prior mortgages, is given by the court as a reason why only forty box cars are decreed to be sold." That cannot be so. It would be "a most lame and impotent reason;" for the fact that they were so included would be no reason why they should not be sold on a subsequent mortgage, subject to the lien of the prior mortgage, as in fact they were.

Again the counsel says, "the court had determined in the second mortgage case that no rolling stock was included in and covered by it." As we have before shown, the court determined no such thing. It determined that said mortgage was not a *first* lien upon any of the rolling-stock. If the counsel's doctrine is true that the second mortgage covered no rolling stock, would not the same reasoning apply to the Barnes mortgage, and consequently the Minnesota Company would have no right to the rolling-stock? The court properly quoted the description of the mortgage in this case, and intended the rolling-stock would be sold, but subject to prior mortgages. There was no occasion to follow the general language of the description in the decree in the Bronson and Soutter mortgage, with a direction to sell particular rolling-stock, for the court had determined that there was none to be particularly described.

Does the counsel seriously contend that if there had been a sale under this mortgage, that the Minnesota company

could have claimed the rolling stock on the road as against the purchaser? Does he contend even as against the Palmer mortgage, or the Bronson and Soutter mortgage, that the Minnesota company could have claimed the forty box cars which the court decided were covered by the land grant as the first lien? Most certainly he could not, for the other mortgages were liens upon them subject to the land grant.

The counsel objects that our title to this rolling stock is not valid for the reason that the district court was not authorized to confirm the sale. We submit that the act of March, 1863, gave the district court full power and authority to confirm sales made on its decrees. The district court was authorized to execute its decrees, and without the power to confirm a sale a decree of foreclosure could not be executed. The presiding justice of that circuit and the district judge conferred upon this subject, and came to the conclusion it was for the district court, and we claim rightfully. Wallace, 405.

The decree was executed by a sale of the mortgaged premises by the marshal. His advertisement of sale described the premises to be sold in the precise words of the description in the mortgage, with this addition, viz:

> The rolling stock hereinbefore mentioned is to be sold subject to the lien of mortgages executed prior to the 31st day of December, A. D. 1856, except forty box cars, numbered 330, 332, 334, 336, 338, 340, 342, 344, 346, 348, 350, 352, 354, 356, 358, 360, 362, 364, 366, 368, 370, 372, 374, 376, 378, 380, 382, 384, 386, 388, 390, 392, 394, 396, 398, 400, 402, 404, 406, 408; and except such proportion or share of said rolling stock purchased and procured by the receiver, costing one hundred and forty-seven thousand nine hundred and forty-two dollars and sixty-three cents, as the net revenue of the portion of railroad of the La Crosse and Milwaukee Railroad Company hereinbefore mentioned and described bears to the balance or other end of said road since the appointment of the receiver; which said forty box cars and said proportion of rolling stock purchased by the receiver are to be sold free and clear of any incumbrance whatever.

The sale was had in pursuance of the advertisement. The marshal first reported the sale of the lands granted by Congress, and then the report reads as follows:

> And I then offered for sale, and sold in like manner the balance of the premises and property described in said decree, as follows, to wit: all and singular the several tracts, pieces or parcels of land which constitute the site of the roadways, turn-outs, engine houses, workshops, depots and other buildings, and all the other lands and real estate which constitute part of the roads of said Railroad Company from Madison, by way of Portage City, to the St. Croix river or lake, between townships 25 and 31, and from Portage City to La Crosse; and also all and singular the superstructure of said roads, and all the engine houses, workshops, depots and other buildings, and all the other improvements on or pertaining to said roads, and all and singular the locomo-

tive engines and other rolling stock, and all the other equipments of every kind and description, which have been procured for or used on said roads, or either of them, and all the materials, tools, implements, utensils and other personal property which have been procured for or used in connection with said roads or either of them; and also all and singular the rights, privileges and franchises of said La Crosse and Milwaukee Railroad Company, of every kind and description, relating to said roads, (of said rolling stock forty box cars, numbered respectively 330, 332, 334, 336, 338, 340, 342, 344, 346, 348, 350, 352, 354, 356, 358, 360, 362, 364, 366, 368, 370, 372, 374, 376, 378, 380, 382, 384, 386, 388, 390, 392, 394, 396, 398, 400, 402, 404, 406 and 408, and such proportion or share of rolling stock purchased and procured by the receiver, costing one hundred and forty-seven thousand nine hundred and forty-two dollars and sixty-three cents, as the net revenues of the portion of the road covered by the aforesaid mortgage bear to the balance or other end of said road, was sold free of all lien or incumberance; but the remainder of the above mentioned rolling stock was sold subject to the lien of mortgages prior in date to the mortgage above mentioned, given by said La Crosse and Milwaukee Railroad Company,) together with the tolls, rents and income to be had or levied therefrom, and all corporate and other rights, franchises and privileges of the said Company, of, in and to, or concerning the same, being all the property, real or personal, described in the said mortgage, (except the lands therein mentioned, granted by Congress to the State of Wisconsin.) and all and singular the privileges, hereditaments and appurtenances to the same belonging, or in anywise appertaining, situate, lying and being in the State of Wisconsin, which was bid off by William Wallace Pratt and William H. White, for the sum of two million six hundred and seventy-five thousand dollars, ($2,675,000,) they being the highest and best bidders, and that being the highest and best bid made for the premises last above described.

Record, 83, folio 125.

It will be seen that the marshal advertised for sale and sold the precise property described in the mortgage, and no other or different; that he sold so much of the rolling stock as the court had determined; the land grant mortgage was a first lien, free and clear of all incumbrance, and the residue of it subject to mortgages prior in date to the 31st day of December, 1856.

He sold no property except what was included in the mortgages, and still the counsel opposed says that he sold the rolling stock pertaining to the eastern division, thereby fully admitting that our mortgage did, in fact, cover the rolling stock in question.

This sale was reported as above, and the counsel was fully heard on the question of confirmation, but he now informs us that he did not know what was in the master's report. We can only say he should have known.

This sale was confirmed on the 6th day of May, 1863, as follows:

Confirmation of Sale.

This day came the parties by their counsel, and the argument of the several exceptions to the sale of the mortgaged premises by the marshal being concluded, it is ordered by the Court that said exceptions be and are hereby overruled.

And it is further ordered and decreed by the Court that said sale so as aforesaid made be and hereby is confirmed, and that the marshal make a deed to the purchasers.

Record 84.

This sale having been confirmed as made, the purchasers—Pratt & White—received a deed from the marshal which described the property conveyed precisely as it is described in the report of sale. Said purchasers thereupon formed the Milwaukee and St. Paul Railway Company, under and in pursuance of the provisions of chapter 79 of the Revised Statutes of Wisconsin, and conveyed to it the premises so as aforesaid purchased by them. The Milwaukee and St Paul Railway Company thereupon applied to the district court to be let into the possession of the premises so as aforesaid purchased, the same being in the hands of the receiver appointed by said Court in said foreclosure suit. Messrs. Ryan & Carpenter objected to the granting of said petition, except as to the western division, and the rolling stock and property specially described in the decree, and therefore the Court directed the receiver to deliver over to the said Milwaukee and St. Paul Railway Company the said railroad and appurtenances between Portage City and La Crosse and the rolling stock and property specially described in the decree. And the receiver was further ordered to make a full and perfect inventory of all rolling stock other than said forty box cars specially mentioned in the decree, and of all personal property belonging to the said La Crosse and Milwaukee Railroad Company, including such as had been purchased by the receiver, and that he make report on the 8th day of June (then) next. Said order further provided that said Milwaukee and St. Paul Railway Company and said receiver should jointly operate said road from Milwaukee to La Crosse, and that the said receiver should receive all the tolls and income from the whole line from Milwaukee to La Crosse, and that said petition be further heard on said 8th day of June.

The counsel says that this order gave the Milwaukee and St. Paul Railway Company possession of all they had purchased; but, in truth and in fact, it gave them possession of nothing. There was no serious opposition to our right to the road bed of the west division and the forty box cars, and a qualified possession of them was given, but the real possession and control was left with the receiver, and he was authorized to receive the revenues. There was no hearing or argument of the parties, but the real hearing was adjourned to the 8th day of June, at which time, after hearing of the parties for three days,

an order was made putting us in possession of what we had purchased under the land grant mortgage, as follows :

Greene C. Bronson, James T. Soutter and Shepherd Knapp, Trustees, *vs.* La Crosse and Milwaukee Railroad Company, J. Albert Helfenstein, Trustee, *et als.* In Equity.

In consideration of the said petition of the Milwaukee and St. Paul Railway Company, and of the arguments of counsel, it is ordered by the Court that there be delivered over to the said Milwaukee and St. Paul Railway Company all and singular the railroad between the city of La Crosse and Portage City, its road-bed and track, with its depots, station-houses, and all other property belonging to said railroad between the said points, and the forty box cars mentioned and described in the decree.

And also the share or proportion of the rolling stock and personal property purchased by the receiver as mentioned in the decree. And also, subject to other or previous liens or claims, the possession of the rolling stock on hand when the receiver took the same under the order of the Court; and it is further ordered by the Court that the said receiver be and hereby is discharged as such from the management and control of the said western division of said railroad under appointment in this case, subject, however, to the final settlement of his accounts, and subject to the orders made or to be made in this case and in the other cases in which he was appointed or may hereafter be appointed.

See Counsel's Brief, page 28.

Under this order, so made, the Milwaukee and St. Paul Railway Company took possession of the said western division, said forty box cars, and their proportion of the rolling stock purchased by the receiver, and also of all the rolling stock on said road when the receiver took possession of the same as purchaser. As to the said western division, said forty box cars and said proportion so purchased by the receiver, free and clear from all incumbrances, and as to the residue of the rolling stock subject to mortgages given by the La Crosse and Milwaukee Company prior in date to the 31st day of December, 1856, the Milwaukee and St. Paul Railway Company have ever since so held and now do hold said rolling stock as owner as aforesaid, and it is most respectfully submitted that the appellant is not at liberty to question that title.

JOHN W. CARY,
Of Counsel for Appellee.

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